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Supreme Court of the United States

No. 73-1973

October Term, 1974

ART THEATER GUILD, INC., *et al.*,
Appellants,

vs.

STATE OF OHIO *ex rel.*, CLARK L. EWING,
Appellee.

On Appeal from the Supreme Court of Ohio

JURISDICTIONAL STATEMENT

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Supreme Court of the United States

No. _____

October Term, 1974

ART THEATER GUILD, INC., *et al.*,
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vs.

STATE OF OHIO *ex rel.*, CLARK L. EWING,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of Ohio entered February 27, 1974, rehearing denied April 4, 1974, which modified, and affirmed, as modified the judgment of the Court of Appeals of Lucas County, Ohio (Sixth Appellate District). Said judgments upheld the constitutionality of Sections 3767.01 through 3767.99, Ohio Revised Code. Appellants submit this jurisdictional statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the Supreme Court of Ohio is reported at 37 Ohio St. 2d 95. A copy of the opinion is attached hereto as Appendix A.

JURISDICTION

This suit was brought pursuant to Chapter 3767, Ohio Revised Code by the appellee. The Court of Common Pleas of Lucas County, Ohio entered judgment on September 16, 1970. The Court of Appeals of Lucas County (Sixth Appellate District) entered its judgment on August 18, 1971. The Supreme Court of Ohio entered its judgment on February 27, 1974 and denied a motion for rehearing on April 4, 1974.

The jurisdiction of the Supreme Court to review this decision by appeal is based on Title 28, U. S. Code, Section 1257(2) in that this case draws in question the validity of statutes of the State of Ohio on the grounds of their being repugnant to the Constitution of the United States, and the decisions below were in favor of their validity.

STATUTE INVOLVED

The Ohio Nuisance Statute, Ohio Revised Code Sections 3767.01, et seq. is set forth in Appendix B.

QUESTIONS PRESENTED

1. Whether the statutory scheme of the Ohio Nuisance Statute, Ohio Revised Code Sections 3767.01 et seq., on its face and as applied to the exhibition of motion picture films, claiming First Amendment protection, unduly inhibits free expression in violation of the First and Fourteenth Amendments to the United States Constitution.

2. Whether the distribution and exhibition of the film "Without A Stitch" is activity protected by the First and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

Appellee Clark Ewing, a private citizen residing in Lucas County, Ohio, brought this action in the Court of Common Pleas of Lucas County, Ohio, in the name of the State of Ohio, under the asserted authority of Section 3767.01, et seq., of the Ohio Revised Code, for the purpose of securing a temporary and permanent injunction to prevent the exhibition of the picture "Without A Stitch" in the State of Ohio, and for an accounting of the box office receipts, which he prayed be forfeited to the State of Ohio, all on the theory that the film constituted a nuisance, as defined by O.R.C. Section 3767.01 et seq.

The film opened at the Westwood Art Theater in Toledo, Lucas County, Ohio on July 17, 1970. This action was commenced on August 10, 1970.

The case was expedited and trial commenced on August 25, 1970.

On September 16, 1970 the Court of Common Pleas found the film to be obscene for the various reasons set forth in the opinion, Appendix I *infra*.

The trial court then proceeded, on its own motion, to set bond at Twenty Thousand ($20,000.00) Dollars for the purpose of permitting the film to be shown pending appeal to the Lucas County Court of Appeals, and, if necessary, to the Ohio Supreme Court. The only relief granted by the trial court was an injunction against appellants from exhibiting the motion picture in Ohio (stayed on appeal). The court added, "the question of forfeiture as prayed for in the petition is stayed pending final adjudication."

From this judgment an appeal on law and fact was taken to the Lucas County Court of Appeals. Under the now abandoned Ohio practice, such an appeal could be taken in certain classes of cases, and the appeals court heard the case *de novo* on the record below and on addi-

tional evidence. The only additional evidence heard went to establish the procedure for barring juveniles from the theater during the run of this picture.

The Court of Appeals made its own findings of fact and concluded, in an opinion set forth at Appendix G *infra*, that the film was obscene and should be permanently enjoined from exhibition in the State of Ohio. In addition, the Court of Appeals held that all of the remedies contained in Chapter 3767 of the Revised Code were mandatory and accordingly ordered the theater closed for a year, assessed a Three Hundred ($300.00) Dollar tax and ordered an accounting of the box office receipts from the date of the final order of the Court of Common Pleas through the final performance.

One of the three judges of the Court of Appeals concurred on the granting of the permanent injunction and the other relief but dissented from that part of the judgment which ordered an accounting of the box office receipts. The majority and dissenting opinions are contained in the appendix herein, Appendix G *infra*.

An appeal was then taken to the Ohio Supreme Court. That Court agreed to hear the case but limited its review to questions concerning the Ohio Nuisance Statute. The Ohio Supreme Court refused to review the question of the obscenity of the film.

On February 27, 1974 the Ohio Supreme Court announced its decision, reported at 37 Ohio St. 2d 95 *sub. nom. State ex rel. Ewing v. Without A Stitch*. A motion for rehearing was filed by the original plaintiff and this motion was denied on April 4, 1974.

The Ohio Supreme Court modified the judgment of the Court of Appeals in that it permitted an accounting of net profits only from the time of the original injunction. It held that the statute did not permit forfeiture of box office

receipts. It further held that although the theater could be closed for a year, the theater could remain open if the owners of the real estate posted a bond in the amount of the value of the real estate conditioned on the agreement not to show the proscribed film. However, the Ohio Supreme Court upheld the constitutionality of the statute against the various attacks based on the First and Fourteenth Amendments to the United States Constitution.

The Film and Its Exhibition

The film is in Danish with English sub-titles and lasts 96 minutes. The Westwood Art Theater followed the instructions of the distributor that no persons under 18 were to be admitted under any circumstances. The theater is a closed, or "hard top" theater, not a drive-in.

The trial was conducted without a jury. The judge viewed the film. The appellee testified as to his interest in banning the film. Appellee also called as a witness Dr. Anders Otterland, a medical school professor, who testified that the film represented a doctor practicing in an unethical fashion, while giving the impression that the doctor's techniques were ethical.

Appellants called three expert witnesses, Dr. Frank A. Hoffman, an expert on erotic art and folklore; Louis M. Pesce, former New York state film censor, and presently advisor to the film industry; and Dr. Michael Greicus, an English professor.

THE QUESTIONS ARE SUBSTANTIAL

I.

THE OHIO NUISANCE STATUTE (OHIO REVISED CODE §3767.01, et seq.) IS A CONSTITUTIONALLY INFIRM MEANS OF CONTROLLING OBSCENITY.

Sections 3767.01, et seq., Ohio Revised Code, upon which the instant action is based, sets out a statutory scheme for the prohibition of nuisances which the statute defines to include places where obscene films are exhibited. Section 3767.01. The Ohio Supreme Court in the case at bar has interpreted the definition of nuisance in this section to include a place where a single obscene film is exhibited, 37 Ohio St. 2d 95, 97-98 (1974), and has further superimposed upon the statutory scheme the definition of obscenity contained in Ohio's criminal obscenity statutes, Ohio Revised Code Sections 2905.34 and 2905.35.*

Upon a finding of nuisance, the statutory scheme permits injunctive relief, both temporary and permanent, before and after notice and hearing. Sections 3767.02, 3767.03, 3767.04. Violators may be summarily tried and punished by the court, sitting without a jury, Section 3767.07, and a maximum fine of $1,000.00 and six months imprisonment for each offense may be imposed. Section 3767.99. Additional penalties include forfeiture of all personal property on the premises, Section 3767.06, levy of special taxes and liens against the property where the nuisance occurred, Sections 3767.08, 3767.09, voiding leases of premises where nuisances occurred, despite the contractual relationship between landlord and tenant, Section 3767.10, and closing of the place against its use for any purpose for a year, Section 3767.06. And the Ohio Supreme Court, in the instant case, has interpreted these

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* Effective January 1, 1974, these statutes were superseded by Sections 2907.01 and 2907.32, similar in substance to the earlier legislation.

penalties to be mandatory, once a nuisance is found. 37 Ohio St. 2d 95, 103-105 (1974).

It is apparent that such a statutory scheme, as interpreted by the highest court in the State of Ohio, when applied to the delicate problem of separating constitutionally protected films from those which may be regulated by government, falls far short of the required constitutional standard under the First and Fourteenth Amendments. Moreover, it violates the requirements of substantive and procedural due process of law as well.

The statutory scheme is pockmarked with defects of constitutional dimension, which, individually or collectively, require the Court to strike it down *in toto*.

First, no standard of what constitutes a statutory nuisance appears in the statute. The Ohio Supreme Court, in an attempt to cure this ambiguity, has engrafted upon the statute the definitions of obscenity contained in Ohio's criminal obscenity statutes, Sections 2907.01 (formerly 2905.34) and 2907.32 (formerly 2905.35), Ohio Revised Code. To the extent that these statutory definitions designate as obscene depictions of mere nudity, see *Roth v. United States*, 354 U.S. 476 (1957), and sexual conduct with the requisite prurient appeal, but neither patent offensiveness nor lack of serious value, see *Miller v. California*, 413 U.S. 15 (1973), these statutes are void for overbreadth. To the extent that they include such ambiguous language as "in a way which tends to represent human beings as mere objects of sexual appetite", Section 2907.01, (F) (2), and appeal to prurient interest "for its own sake" for "commercial exploitation" rather than for a "genuine . . . moral . . . purpose" Section 2907.01 (F) (5), they suffer the vice of vagueness. See *Musser v. Utah*, 333 U.S. 95 (1948); *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676 (1968). The overbreadth of these statutory definitions irretrievably contaminate the nuisance statute upon which

they have been engrafted by judicial construction. *N.A.A.C.P. v. Alabama*, 377 U.S. 288 (1964).

Second, Section 3767.01 describes only obscene films as nuisances subject to the penalties of the statute, but not books, magazines or pictures of similar character or content. Such a classification is both an arbitrary denial of substantive due process and equal protection of the laws guaranteed by the Fourteenth Amendment. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

Third, Section 3767.04 authorizes the trial court to issue temporary restraining orders and injunctions without hearing evidence and without any standards of proof except "to the satisfaction of the court or judge." Provision for the release of such judicial restraints cast the burden of proof of innocence upon those restrained. Failure to make such proof allows these restraints to remain in effect until final disposition of the case.

In addition to the substantial due process questions raised by such provisions, see *Speiser v. Randall*, 357 U.S. 513 (1968), serious issues of prior restraint and inhibition of distribution of protected materials are presented by the interlocutory powers given the trial court by this statute. See *Near v. Minnesota*, 283 U.S. 697 (1931); *Carroll v. Princess Anne County*, 393 U.S. 175 (1968).

Fourth, Section 3767.04 requires that an owner of premises, previously enjoined without proof of his guilty knowledge, in order to avert the closing of his premises until final judgment, must, in addition to paying costs and posting bond in the full value of the real estate, prove to the satisfaction of the court his own good faith and the innocence and lack of guilty knowledge of owners of personal property on the premises. Such shifting of the burden of proof of *scienter* from the censors to the censored as a precondition to permitting exhibition of not-yet-adjudicated films claiming First Amendment protection operates

as a prior restraint and unwarranted intrusion on distribution of borderline protected materials. *Near v. Minnesota, supra, Smith v. California,* 361 U.S. 147 (1961). No less do the other burdens imposed upon one who would avert such closing of his premises inhibit free expression.

Fifth, Section 3767.05 permits proof of prima facie nuisance at the trial on the merits by "evidence of the general reputation of the place" or "an admission or finding of guilt of any person under the criminal laws against . . . lewdness." The statute allows such proof to be admissible to prove knowledge, acquiescence and participation, as well as nuisance. Coupled with the statutory admonition in Section 3767.06 that "every defendant in the action is presumed to have knowledge of the general reputation of the place," these provisions effectively obviate the constitutional requirement that the censor prove guilty knowledge as a precondition to suppression of expression, *Smith v. California, supra,* and the similar self-imposed requirement of the Ohio Supreme Court in this case that guilty knowledge is an essential element of proof of nuisance. 37 Ohio St. 2d 95, 101-102 (1974).

Sixth, Section 3767.06 authorizes establishment of nuisance at the final hearing on the merits "as provided in Sections 3767.01 to 3767.11". Thus, all of the inadequate procedures employed at the temporary restraining order and injunctive stages, including the inadequate standard of proof "to the satisfaction of the court," and improper shifting of the burden of proof from complainant to the defendants, have been transported to the conduct of the final hearing, the harsh consequences of which, in terms of permanent injunctive orders, taxes and penalties, have been previously described.

The imprecision of such a means of controlling distribution of films claiming First Amendment protection is

apparent. Its due process implications are equally evident. *Speiser v. Randall, supra.*

Seventh, Section 3767.06 directs, upon establishment of nuisance at the final hearing on the merits, "the closing of the place against its use for any purpose . . . for a period of one year" and the sale of personal property on the premises. Other penalties, previously enumerated, are mandatory under the statute as construed by the Ohio Supreme Court in the opinion below. Sections 3767.08, 3767.09, and 3767.10. Quite apart from the harshness of all of these accumulated penalties as an inhibition upon the distribution of borderline protected materials, the closing of a theater for a year prevents it, during that period, from exhibiting any film, whether or not sexually oriented, whether or not protected by the First Amendment and whether or not previously adjudged to be obscene in a court of law. That such a result, after the adjudication of obscenity of *one* film, under the questionable standards and procedures provided by this statute, raises implications. of prior restraint of the most serious kind. See *Near v. Minnesota, supra; Pursue v. Huffman,* 14 Cr. L.R. 4221 (W. D. Ohio 4/20/73.)

Eighth, Section 3767.06, pointed out by the court below as ameliorating the harsh result of a one-year closing, 37 Ohio St. 2d 95, 104-105 (1974), permits the release of an order of closing only if the owner of premises pays all costs, posts bond in the full value of the property, and demonstrates to the court's satisfaction that he will not permit the nuisance to reoccur, as outlined in Section 3767.04. Whether or not such option of the *owner of the premises* ameliorates the harshness of the remedy as to *him,* it does nothing to save the tenant in possession or operator of the theater, neither of whom have any such correlative statutory right. Neither does it alleviate the problem of compelling the owner to come forward and

disprove affirmatively what the complainant was never required to prove under the statute to obtain the closing order in the first instance. Nor does it deal in any way with the constitutional problem of compelling a citizen to pay a substantial penalty to exercise his First Amendment freedoms. *Speiser v. Randall, supra.*

Ninth, Section 3767.01, which purports to define nuisance, makes no distinction between private possession and public dissemination of obscene materials and applies sanctions against both. Governmental regulations of private possession and use of obscenity is constitutionally impermissible. *Stanley v. Georgia,* 394 U.S. 557 (1969). No attempt was made by the Ohio Supreme Court in the opinion below to construe this statute to avoid such obvious overbreadth. Appellants have standing to attack this constitutional infirmity even though their conduct might have been reached by a more narrowly drawn piece of legislation. See *Griswold v. Connecticut,* 381 U.S. 479 (1965).

Tenth, Section 3767.07 provides for summary trial and punishment of persons in contempt of orders issued under authority of Sections 3767.01, et seq. Section 3767.99(A) provides a maximum penalty of six months imprisonment and $1,000 fine for each offense. Under such risk of serious penalty and incarceration upon a guilty finding, trial by jury must be permitted. *Bloom v. Illinois,* 391 U.S. 194 (1968).

Eleventh, although the statutory scheme permits the censorship of materials which claim First Amendment protection it provides no procedural assurance of an immediate hearing after either temporary or permanent restraint, no assurance of an immediate judicial decision thereafter, and no assurance of a speedy and accelerated judicial review. Such a censorship system is constitutionally impermissible. *Freedman v. Maryland,* 380 U.S. 51 (1965);

Teitel Film Corp. v. Cusack, 390 U.S. 139, 141-142 (1968); *Blount v. Rizzi*, 400 U.S. 410 (1971).

Twelfth, Section 3767.04 permits *ex parte* restraining orders against the distribution and transportation of films claiming First Amendment protection without a prior judicial determination of their obscenity. See *Heller v. New York*, 413 U.S. 483 (1973), *Rowden v. Kentucky*, 413 U.S. 496 (1973).

Thirteenth, Section 3767.06 provides that "every defendant in the action is presumed to have knowledge of the general reputation of the place." Since evidence of the general reputation of the place is admissible to prove the nuisance, knowledge of, acquiescence and participation in maintaining it, Section 3767.05, and, since guilty knowledge has been construed to be a necessary element of a finding of nuisance, 37 Ohio St. 2d 95, 101-102 (1974), see also *Smith v. California, supra*, such presumption substitutes for proof of a critical fact in establishing a nuisance under the statute. It is apparent that there is no rational connection between the fact of being named a defendant in an action under the Ohio Nuisance Statute and any degree of guilty knowledge of the general reputation of a place where a nuisance may have been maintained. The presumption must therefore be regarded as irrational or arbitrary because clearly the presumed fact is not "more likely than not to flow from the proved fact on which it is made to depend." *Leary v. United States*, 395 U.S. 6, 36 (1969).

Thus, it is apparent that the Ohio Nuisance Statute, in whole or in many of its parts, falls substantially short of the constitutional mark. The Ohio Supreme Court's desperate attempt to save it by construction has only served to emphasize its inherent constitutional defectiveness. By interpreting the harsh statutory consequences

to flow mandatorily and without exception from a finding that a theater has exhibited a single film adjudged under loose statutory procedures to be obscene, the Court below has squeezed whatever flexibility out of the legislation there might have been, and which might arguably have saved it from constitutional decimation.

The Ohio legislature and its highest Court, in a delicate area which requires the precision of an artist's finest brush strokes, has painted upon the canvas of legitimate governmental obscenity regulation with a dripping wall roller.

Appellants are aware of no decided case in which this Court has yet considered the constitutional implications of a state's attempt to control obscenity by means of a nuisance statute of the type here involved.*

In an area in which sensitive regulatory procedures are constitutionally compelled, *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *Miller v. California, supra*, this Court's plenary consideration of this issue is imperative.

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* The Court has noted probable jurisdiction in two such cases, *Huffman v. Pursue, Ltd.*, 14 Cr. L. R. 4221 W. D. Oh. 4/20/73 and *MTM, Inc. v. Baxley*, 365 F.Supp. 1182 (N.D. Ala. 1973) in which issues other than those raised in this jurisdictional statement are also presented.

II.

THE FILM IS CONSTITUTIONALLY PROTECTED EXPRESSION.

The Ohio Supreme Court limited its review to the questions surrounding the Ohio Nuisance Statute and refused to review the question of the obscenity of the film.

The Court of Appeals first found that the film ran afoul of the tests of *Roth v. United States*, 354 U.S. 476 (1957) and *Memoirs v. Massachusetts*, 383 U.S. 413 (1966). The Court then added,

> We have also considered as indicative but not conclusive of national standards the laws of the State of Ohio and other states. See *Roth, supra*, p. 485.

Footnoted to this sentence was the language of Section 2905.34, Ohio Revised Code, defining obscenity, and also statutes making criminal the following acts: adultery or fornication, inducing illicit intercourse, prostitution, lewdness and assignation, indecent exposure, nudism, and sodomy.

This litany followed a theme offered by the Court of Common Pleas in the original decision, in which contemporary community standards were determined by reviewing what acts are made illegal by the state legislature. At paragraph 10 of its findings of fact the Court of Common Pleas said:

> That acceptability by a movie audience is not the true criteria of the measurement of community standards relating to the representation of sexual matters or acceptance of a movie by the community because the attending audience, as in this case, is a very small segment of the community. The proper criteria for a valuation of contemporary standards of the community relating to the representation of sexual matters must necessarily be the enacting and enforcement of laws by that community governing the conduct of citizenry; that simple reference to the Ohio

> Revised Code sets forth the legal moral standards of the people of Ohio, including Lucas County, on sex matters and that there is generally attempted enforcement in this community. These Sections include, but are not limited to, the following:
>
> Sec. 2905.08 O.R.C., Adultery or Fornication
> Sec. 2905.10 O.R.C., Prostitution
> Sec. 2905.30 O.R.C., Indecent Exposure
> Sec. 2905.30 O.R.C., Solicitation of unnatural sex act
> Sec. 2905.31 O.R.C., Nudism
> Sec. 2905.44 O.R.C., Sodomy
>
> There are existing similar statutes in the majority of states giving an inference of national community standards.

It is interesting to note this technique for determining contemporary community standards was seized upon by Charles H. Keating, Jr. in his dissenting opinion in the *Report of the President's Commission on Obscenity and Pornography*, Bantam Books, 1970, p. 578, et seq. In his Exhibit "H" he argues that a film "can be so grossly obscene that it is 'obscene as a matter of law.'" He then reproduces a part of appellee's brief below in this case wherein it is argued that since the film depicts acts that are illegal in Ohio, the film is obscene as a matter of law. At p. 699:

> It is the prerogative of this Court to take judicial notice of the laws of the state of Ohio relating to sexual morality and apply them in determining the issue of obscenity in this case.

In closing he quotes *in toto* paragraph 10 from the Findings of Fact of the Common Pleas Court, as set forth at p. 14, *supra*.

The Court of Appeals has seized on this as is evident from its opinion, as quoted at p. 14, *supra*.

Furthermore, the Ohio Supreme Court has seemingly adopted this strange technique for determining contemporary community standards. In *State ex rel. Keating v. Vixen*, 27 Ohio St. 2d 278 (1971) *reversed and remanded*, 413 U.S. 905 (1973) *on remand* 35 Ohio St. 2d 215 (1973) the Ohio Supreme Court approves the technique of permitting the exhibition of an otherwise "obscene" film if portions depicting actual or purported acts of sexual intercourse are deleted. Such wholesale disregard of the mandate to view a film, "as a whole" in determining its dominant theme, *Roth v. United States, supra*, is indicative of the unorthodox techniques employed by Ohio courts in determining obscenity.

It is submitted that fairness demands a review of the film at bar in light of the tests set down by this Court in *Miller v. California*, 413 U.S. 15 (1973).

> A state offense must also be limited to works which, *taken as a whole*, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, *taken as a whole*, do not have serious literary, artistic, political or scientific value. (Emphasis supplied.)

Miller was decided on June 21, 1973, almost two years after the instant Court of Appeals decision. Since the Ohio Supreme Court refused to review the film's obscenity, no court has reviewed the obscenity of this film since *Miller* was announced.

The reliance by the lower Ohio courts on patently irrelevant standards requires a review of the obscenity of the film in question on the basis of present case law.

CONCLUSION

This jurisdictional statement has attempted to present a brief description of the substantial issues involved in this appeal and why this Court should give plenary consideration to them.

Appellants were permanently enjoined from exhibiting a film which they continue to assert was constitutionally protected expression. By the application of bizarre reasoning, the trial court and the court of appeals found the film to be obscene and, therefore, a nuisance.

As a consequence, the theater which exhibited the film was ordered closed for a year for all purposes, a tax was assessed against the appellants, their personal property was forfeited, and an accounting of box office receipts was ordered.

All of these penalties resulted from the authority and application of the Ohio Nuisance Law, as construed by the Ohio Supreme Court.

Both the constitutionality of the Ohio Nuisance Law and the validity of the judicial finding that the film, "Without a Stitch" was obscene are presented to this Court by the within appeal.

Drawing an appropriate balance between legitimate state interests in controlling obscenity and protection of freedom of expression continues to be a matter of urgent business of this Court. In an area where "sensitive tools" *Speiser v. Randall*, 357 U.S. 513, 525 (1958), are required to regulate the dissemination of obscenity, both the Ohio Nuisance Law and the means by which the Ohio courts

separate protected from unprotected expression require the plenary attention of this Court.

Respectfully Submitted,

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APPENDIX A

Opinion of the Supreme Court of Ohio

(Decided February 27, 1974)

No. 71-649

IN THE SUPREME COURT OF OHIO

Appeal from the Court of Appeals for Lucas County

THE STATE, EX REL. EWING, APPELLEE, *v.* A MOTION PICTURE FILM ENTITLED "WITHOUT A STITCH" ET AL., APPELLANTS.

Criminal law—Exhibition of obscene motion picture film—Nuisances—Action to abate—R. C. 3767.01 et seq.——Constitutionality—Applicability, where single film exhibited — Remedies mandatory — Forfeiture of receipts not permitted—Order closing theater must be released, when—Evidence.

1. The exhibition of a single obscene motion picture film is sufficient to render a theater a nuisance as defined in R. C. 3767.01(C). (*State, ex rel. Keating, v. Vixen*, 27 Ohio St. 2d 278, followed.)

2. R. C. 3767.01 *et seq.* do not provide for or allow censorship of motion picture films prior to a judicial determination of obscenity.

3. R. C. 3767.01 *et seq.* prescribe a constitutionally permissible method for controlling the exhibition of obscene motion picture films.

4. Upon a judicial determination that a theater is exhibiting an obscene motion picture film, the trial court must (a) immediately issue a permanent injunction, pursuant to R. C. 3767.05, forbidding the future exhibition of the film by the defendants; (b) impose a tax of three hundred dollars, pursuant to R. C. 3767.08, upon the nuisance and any person maintain-

ing it; (c) order the removal and sale of all personal property used in conducting the nuisance pursuant to R. C. 3767.06, subject to certain exceptions provided therein; and (d) order the theater closed for one year, pursuant to R. C. 3767.06.

5. The one-year closing order mandated by R. C. 3767.06 must be released by the trial court if the owner of the premises pays the cost of the abatement action, files a bond in the full value of the property, and demonstrates to the court that he will not exhibit the particular film or films declared to be obscene.

6. R. C. 3767.01 *et seq.* do not permit the forfeiture of box office receipts derived from the exhibition of a motion picture film after it was declared to be obscene.

Appellee brought this obscenity-nuisance abatement action under R. C. 3767.01 *et seq.* against a motion picture film entitled "Without a Stitch," the manager of the local theater where the film was playing, the corporate owner of the theater, and the corporate owner of the distribution rights in the film.

The Court of Common Pleas held that the film was obscene and permanently enjoined the owners, appellants herein, from exhibiting the film. However, the court stayed execution of the injunctive order pending appellate review. As a result of the stay, appellants were permitted to exhibit the film after the judicial determination that the film was obscene.

The Court of Appeals affirmed the finding of obscenity and held that the film's exhibition by the theater rendered the theater itself a nuisance. The court held further that R. C. 3767.01 *et seq.* mandated that the theater be closed for one year and that a tax of three hundred dollars be imposed upon appellants and against the real property on which the theater is located. The Court of Appeals also required appellants to account for and pay to the Lucas County treasurer the box office receipts arising from the exhibition of the film after the effective date of the trial court's injunctive order.

The cause is now before this court pursuant to the allowance of a motion to certify the record.

Mr. Warren D. Wolfe and *Mr. James J. Clancy*, for appellee.

Messrs. Fuhrman, Gertner, Britz & Barkan, Mr. Harland M. Britz and *Mr. Edmund C. Grainger, Jr.*, for appellants.

O'NEILL, C. J. The granting of the motion to certify allowing this appeal removed the issue of obscenity from this case. There remain the following four issues: (1) The applicability of R. C. 3767.01 *et seq.* to a theater in cases involving the exhibition of a single obscene motion picture film; (2) the constitutionality of R. C. 3767.01 *et seq.* prescribing a method for controlling obscenity; (3) the mandatory or discretionary nature of the remedies set forth in R. C. 3767.01 *et seq.*; and (4) the availability of the nonstatutory remedy of forfeiture of box office receipts derived from the exhibition of a film after it was judicially determined to be obscene. Those issues will be analyzed in the same order as listed above.

I.

Appellants contend that, under R. C. 3767.01 *et seq.*, a theater may not be branded a nuisance unless there is evidence that it has exhibited more than one obscene film; that the entire thrust of the trial court proceeding was directed at appellee's allegation that the film "Without A Stitch" was obscene. Appellants' contention is based upon the following statutory definition of nuisance contained in R. C. 3767.01(C):

> "'Nuisance' means * * * any place, in or upon which lewd, indecent, lascivious, or obscene films or plate negatives, film or plate positives * * * are photographed, manufactured, developed, screened, exhibited, or otherwise prepared or shown, and the personal property and contents used in conducting and maintaining any such place for any such purpose. * * *"

Appellants emphasize the use of the plural in that statute to describe when the exhibition of filmed obscenity renders the theater a nuisance, and contend that this is an express legislative declaration that a theater is not a nuisance if the proceedings disclose the exhibition of only one obscene film. However, Webster's Third New International Dictionary defines "motion picture" as "a series of pictures (as photographs taken with a special camera) presented to the eye in very rapid succession * * *." R. C. 3767.01(C) explicitly states that a place which exhibits "obscene * * * film or plate positives * * * " is a nuisance, and therefore the statute is broad enough to include the exhibition of a single obscene film, which is composed of a number of film positives.

This court has already recognized that R. C. 3767.01 *et seq.* can be utilized against the exhibition of a single motion picture. *State, ex rel. Keating, v. Vixen* (1971), 27 Ohio St. 2d 278, 272 N. E. 2d 137 *(judgment vacated and cause remanded,* 413 U. S. 905, 37 L. Ed. 2d 1016, *former judgment adhered to* [1973], 35 Ohio St. 2d 215, 301 N. E. 2d 880), involved the exhibition of the film "Vixen." In a *per curiam* opinion this court (27 Ohio St. 2d, at page 285) concluded that "where *scenes* in *a* motion picture film depict purported acts of sexual intercourse and are exhibited for commercial exploitation, those *scenes* * * * constitute a 'nuisance' within the meaning of R. C. 3767.01, and their exhibition may be enjoined as provided in R. C. 3767.02 *et seq.*" (Emphasis added.)

A federal district court has also upheld the use of R. C. 3767.01 *et seq.* to enjoin the exhibition of a single obscene film. *Grove Press v. Flask* (N. D. Ohio 1970), 326 F. Supp. 574, held that the film "I Am Curious (Yellow)" was obscene, and that R. C. 3767.01 *et seq.* could be invoked to prohibit its showing.

This court holds that R. C. 3767.01 *et seq.* are applicable in cases involving the exhibition of a single motion picture film.

II.

Appellants contend that R. C. 3767.01 *et seq.* are constitutionally impermissible as a means of controlling obscenity. Before the merits of this contention can be discussed, the procedures specified in R. C. 3767.01 *et seq.* and utilized in the present case must be understood.

R. C. 3767.03 permits any citizen of a county in which there allegedly exists a nuisance to bring an abatement action in the name of the state. R. C. 3767.04 provides for the filing and disposition of an application for a temporary injunction. The appellee did file such an application in this case. R. C. 3767.04 also requires that the application for a temporary injunction be heard within ten days of filing, and that all defendants be served with the complaint and notice of the time and place of hearing on the application for a temporary injunction at least five days before the hearing. In the present case, the application for a temporary injunction was filed on August 10, 1970, and a hearing was scheduled for August 19, 1970. However, on the hearing date the court continued the hearing until August 25, 1970, and consolidated that hearing with a hearing on the merits of issuing a permanent injunction.

R. C. 3767.05 provides that a nuisance abatement action "shall have precedence over all other cases except crimes, election contests, or injunctions." In this case, a three-day hearing commencing August 25, 1970, was held. It resulted in the issuance of a permanent injunctive order on September 16, 1970. The application for the temporary injunction was dismissed.

At this point, it should be noted that R. C. 3767.01 *et seq.* do not provide for or allow censorship of films prior to a judicial determination of obscenity. Therefore, the United States Supreme Court decisions, such as *Freedman v. Maryland* (1965), 380 U.S. 51, and *Teitel Film Corp. v. Cusack* (1968), 390 U.S. 139, which specify the constitutional requirements of such a system, are not applicable. Under R. C. 3767.01 *et seq.*, the earliest point in time when the exhibition of a film may be enjoined is upon the granting of a temporary injunction. However, a temporary injunction can only be issued after a judicial hearing at which

all the parties can present evidence on the allegation of obscenity.

Appellants list seven specific reasons why R. C. 3767.01 *et seq.* are unconstitutional as a means for controlling obscenity. First, appellants allege that the definition of nuisance contained in R. C. 3767.01(C) is overbroad. In essence, the statute states that any place which exhibits filmed obscenity is a nuisance, and this court has held that only activity which violates R. C. 2905.34[1] and R. C. 2905.35[2] constitutes a "nuisance" within the meaning of R. C. 3767.01

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[1]R. C. 2905.34 provides:

"As used in sections 2903.13 to 2903.16 inclusive, and sections 2905.34 to 2905.39, inclusive, of the Revised Code:

"(A) any material or performance is 'obscene' if, when considered as a whole and judged with reference to ordinary adults, any of the following apply:

"(1) Its dominant appeal is to prurient interest;

"(2) Its dominant tendency is to arouse lust by displaying or depicting nudity, sexual excitement, or sexual conduct in a way which tends to represent human beings as mere objects of sexual appetite;

"(3) Its dominant tendency is to arouse lust by displaying or depicting beastiality or extreme or bizarre violence, cruelty, or brutality;

"(4) It contains a series of displays or descriptions of nudity, sexual excitement, sexual conduct, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient interest, when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than for a genuine scientific, educational, sociological, moral, or artistic purpose.

"(B) 'Nudity' means the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering or any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.

"(C) 'Sexual excitement' means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

"(D) 'Sexual conduct' means masturbation, homosexuality, lesbianism, sadism, masochism, natural or unnatural sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, a breast.

(Footnote continued on following page)

(C). *State, ex rel. Keating v. Vixen, supra* (27 Ohio St. 2d 278). Upon remand of the *Vixen* case from the United States Supreme Court, this court also held (35 Ohio St. 2d 215) that the definition of obscene material contained in R. C. 2905.34 comports with the constitutional definition of the word "obscenity" as enunciated in *Miller v. California* (1973), U. S. , 93 S. Ct. 2607. Since an obscenity-nuisance abatement action under R. C. 3767.01 *et seq.* is limited to the exhibition of obscene material as defined in R. C. 2905.34, and since R. C. 2905.34 is not overbroad, it follows that the definition of nuisance contained in R. C. 3767.01(C) is not overbroad.

Appellants next argue that R. C. 3767.01 *et seq.* are constitutionally deficient because they do not require that defendants in obscenity abatement actions have knowledge of the contents of the film, a requirement which appellants contend is an essential ingredient of legitimate governmental regulation of obscenity. It was held in *Smith v. California* (1959), 361 U. S. 147, that a local obscenity

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(Continued from previous page)

"(E) 'Material' means any book, pamphlet, ballad, printed paper, phonographic record or tape, motion picture film, print, picture, figure, image, description, or other tangible thing capable of being used to arouse interest through sight, sound, or in any other manner.

"(F) 'Performance' means any motion picture, preview, play, show, skit, dance, or other exhibition performed before an audience."

[2]R. C. 2905.35 provides:

"No person, with knowledge of the content and character of the obscene material or performance involved, shall make, manufacture, write, draw, print, reproduce, or publish any obscene material, knowing or having reasonable cause to know that such material will be sold, distributed, circulated, or disseminated; or sell, lend, give away, distribute, circulate, disseminate, exhibit, or advertise any obscene material; or write, direct, produce, present, advertise, or participate in an obscene performance; or possess or have in his control any obscene material with intent to violate this section; or offer or agree to do any act in violation of this section, or cause any such act to be done by another.

"Whoever violates this section shall be fined not more than five thousand dollars or imprisoned not more than one year, or both, for a first offense, and for each subsequent offense shall be fined not more than ten thousand dollars or imprisoned not less than one nor more than seven years, or both."

ordinance imposing criminal penalties on a bookstore owner for mere possession in the store of a book later judicially determined to be obscene, even if the owner had no knowledge of the contents of the book, was a violation of freedom of the press. The court reasoned that any absolute criminal liability regulation would necessarily force bookstore owners to restrict the books they sell to those they have inspected, which would result in a restriction on the distribution of constitutionally protected, as well as obscene, books. The rationale in *Smith v. California* cannot logically be limited either to purely criminal statutes or to bookstore owners; it is applicable whenever the state attempts to penalize a person, on obscenity grounds, for engaging in an activity normally protected by the First and Fourteenth Amendments to the United States Constitution.

The exhibition of films is an activity normally protected by the First and Fourteenth Amendments. *Kingsley International Picture Corp. v. Regents* (1959), 360 U. S. 684, R. C. 3767.01 *et seq.* penalize persons engaged in the exhibition of obscene films in that R. C. 3767.06 requires that all personal property used in conducting the nuisance be sold and R. C. 3767.08 imposes a tax of three hundred dollars upon persons maintaining the nuisance and upon the theater and the real property on which it is located. Therefore, those penalty provisions can be imposed only if the persons upon whom they are sought to be imposed had knowledge of the content of the film declared to be obscene.

This requirement of *scienter* is not novel. In *State, ex rel. Keating, v. Vixen, supra* (27 Ohio St. 2d 278, 285), this court held that a film constitutes a nuisance which can be enjoined pursuant to R. C. 3767.01 *et seq.* only if scenes in the film violate R. C. 2905.34 *and* 2905.35. R. C. 2905.35 expressly requires knowledge of the contents of the film on the part of any person against whom that statute is sought to be invoked. Therefore, no individual can be penalized under R. C. 3767.01 *et seq.* for maintaining a theater in which an obscene film is exhibited unless it is shown that that person knew of the contents of the film. In the

present case, none of the appellants contended upon appeal that he did not have knowledge of the contents of the film.

Appellants' third reason for asserting that R. C. 3767.-01 *et seq.* are unconstitutional is the allegation that those statutes place the burden of proving that a film is not obscene upon the exhibitor. It is settled that in areas generally protected by the First Amendment, the state must shoulder the burden of proving that the particular activity complained of is outside the scope of constitutional protection. *Freedman v. Maryland, supra* (380 U. S. 51); *Speiser v. Randall* (1958), 357 U. S. 513. However, R. C. 3767.01 *et seq.* do not place the burden of proof upon the defendants in an obscenity-nuisance abatement action. Since the statutes are silent on this point, the general rule, that the burden of proof is on the complainant, is applicable.

Appellants' fourth, fifth and seventh arguments concerning the constitutionality of R. C. 3767.01 *et seq.*, as a method for controlling obscenity, are premised upon the belief that the laws permit censorship without a prior judicial determination of obscenity. This contention has already been discussed and rejected in this opinion.

Appellants' final contention is that *Stanley v. Georgia* (1969), 394 U. S. 557, forbids governmental sanctions against the private possession of obscenity, and that R. C. 3767.01 *et seq.* do not expressly distinguish between private possession and public exhibition of obscenity. That argument was rejected by the United States Supreme Court in *Paris Adult Theater I. v. Slaton* (1973), 413 U. S. 49, 93 S. Ct. 2628, in which the court held that a commercial theater is not equivalent to a private home. Therefore, *Stanley v. Georgia* is not applicable to the exhibition of obscenity by a theater open to the public.

None of appellants' seven reasons for alleging that R. C. 3767.01 *et seq.* prescribe an unconstitutional method for controlling obscenity are valid. It is interesting to note that six of those reasons were also raised and rejected by the federal district court in *Grove Press v. Flask, supra* (326 F.Supp. 574).

This court holds that R. C. 3767.01 *et seq.* prescribe a constitutionally permissible method of controlling the exhibition of obscene films.

III.

Appellants contend that a trial court is not required to invoke every possible remedy provided in R. C. 3767.01 *et seq.* after finding a film to be obscene, and therefore the Court of Appeals erred in holding the remedies mandatory. However, an examination of the statutory language used in R. C. 3767.01 *et seq.* will show that the Court of Appeals was correct.

Upon a finding that a theater is exhibiting an obscene film, R. C. 3767.05, 3767.06 and 3767.08 dictate the relief to be granted. Each statute uses the word "shall" to describe the duty of the trial judge to impose the various remedies stated therein, and this court has held that the use of the word "shall" in a statute must be construed as imposing a mandatory duty unless there appears a clear and unequivocal legislative intent that it receive a meaning other than its ordinary meaning. *Dorrian v. Scioto Conserv. Dist.* (1971), 27 Ohio St. 2d 102. Since no such legislative intent appears in R. C. 3767.01 *et seq.*, the remedies imposed are mandatory.

There are four remedies contained in R. C. 3767.01 *et seq.* which must be invoked upon a finding that a theater is a nuisance as defined in R. C. 3767.01(C).

First, R. C. 3767.05 provides that the trial court enter a judgment perpetually enjoining defendants from maintaining the nuisance. In this case, the nuisance was the showing of the particular film declared to be obscene. Since R. C. 3767.05 mandates an immediate cessation of exhibiting the film, the trial court erred in permitting appellants to continue showing "Without A Stitch" pending appeal.

Second, R. C. 3767.08 requires the imposition of a three hundred dollar tax upon the nuisance and against any person maintaining it. The nuisance in a case involving a theater is defined by R. C. 3767.01(C) to include not only the theater itself, but also the real property upon

which it is located and the personal property used in conducting the nuisance. The question of what specific personal property is encompassed by the use in R. C. 3767.01 *et seq.* of the phrase, "personal property and contents" used in conducting and maintaining the nuisance, has not been raised in this case, and we need not answer it. As noted in our discussion under issue II, *Smith v. California, supra* (361 U. S. 147), interpreting the First and Fourteenth Amendments, requires knowledge of the contents of the film on the part of the person against whom the tax is sought to be imposed as a pre-condition to the imposition of such a tax.

The third mandatory remedy is found in R. C. 3767.06. It requires the removal and sale of all personal property used in conducting the nuisance. However, the owner of such personal property is permitted to escape the sale order by coming into court within ten days after the abatement order is filed and showing that he had neither actual nor constructive knowledge that his property was being used to maintain a nuisance.

The fourth remedy is also contained in R. C. 3767.06. One part of the statute dictates that the abatement order include an order closing the place, in and upon which the nuisance was maintained, for a period of one year. R. C. 3767.06 states that the closing pertains to the use of the property "for any purpose." However, this harsh penalty is ameliorated by permitting the owner to obtain a release from the order by complying with the release provisions of R. C. 3767.04. Those provisions require that the closing order must be released if the owner appears in court, pays the costs incurred in the action, files a bond in the full value of the property, and demonstrates to the court that he will prevent the nuisance from being reestablished. The nuisance is the exhibition of the particular film declared obscene. The release provisions do not, as appellants contend, require the owner to show that no film to be exhibited during the one-year period will be obscene. Such a requirement would not only be impossible, as a practical matter, but also would be an unconstitutional prior restraint on an activity generally protected by the First Amendment.

Freedman v. Maryland, supra (380 U. S. 51); *Speiser v. Randall, supra* (357 U. S. 513). The language of R. C. 3767.06 does not require a construction which would render the one-year closing provision unconstitutional, and this court will not so construe it.

IV.

The final issue in this case is the availability of the remedy of forfeiture of box offices receipts derived from the exhibition of a film after it has been declared to be obscene. As used in this opinion, the word "forfeiture" means the divestment of property without compensation in consequence of some act prohibited by law; such forfeitures are imposed "by the law-making power to insure a prescribed course of conduct." *Justice v. Lowe* (1875), 26 Ohio St. 372, 375. In his complaint appellee demanded that appellants forfeit all receipts derived from the exhibition of "Without A Stitch." The trial court reserved a decision on that issue pending the outcome of appellate review of its finding of obscenity. R. C. 3767.01 *et seq.* do not provide for such a forfeiture; therefore that portion of appellee's complaint demanding forfeiture should have been dismissed by the trial court.

However, the Court of Appeals did not order a forfeiture; it merely required that appellants account for and pay to the county treasurer the receipts obtained from showing "Without A Stitch" after the date on which the trial court's permanent injunction would have become effective had the judge not stayed it. This accounting was not imposed as a result of any illegal act on the part of appellants; it was, instead, a recognition by the Court of Appeals that the trial court erred when it stayed the effectiveness of its injunction order. As noted in our discussion under issue No. III, a trial court is required by R. C. 3767.05 to issue a permanent injunction when it declares a film to be obscene; it does not have the power to stay the effectiveness of the injunction. The only way the Court of Appeals could rectify that error was to assure that appellants did not profit thereby—which was the object of the accounting order.

The Court of Appeals did not specify whether appellants must account for gross receipts or net receipts. However, appellants should not be deprived of gross receipts, as this would unjustly penalize it for an error committed by the trial court. Had the trial court not stayed the injunction, appellant could have used the theater to show a non-obscene film. Therefore, fairness requires that this court construe the accounting order issued by the Court of Appeals to be limited to net receipts derived from exhibiting the film "Without A Stitch" after September 16, 1970, which was the filing date of the trial court's order declaring the movie obscene.

The judgment of the Court of Appeals is modified to reflect our holding that the trial court should have dismissed appellee's demand for forfeiture of all box office receipts derived from the exhibition of the film "Without A Stitch."

Judgment modified and affirmed as modified.

HERBERT, CORRIGAN, STERN, CELEBREZZE, W. BROWN and P. BROWN, JJ., concur.

APPENDIX B

Relevant Sections of the Ohio Revised Code

§ 3767.01. Definitions.

As used in all sections of the Revised Code relating to nuisances:

(A) "Place" includes any building, erection, or place or any separate part or portion thereof or the ground itself;

(B) "Person" includes any individual, corporation, association, partnership, trustee, lessee, agent, or assignee;

(C) "Nuisance" means that which is defined and declared by statutes to be such and also means any place in or upon which lewdness, assignation, or prostitution is conducted, permitted, continued, or exists, or any place, in or upon which lewd, indecent, lascivious, or obscene

films or plate negatives, film or plate positives, films designed to be projected on a screen for exhibition films, or glass slides either in negative or positive form designed for exhibition by projection on a screen, are photographed, manufactured, developed, screened, exhibited, or otherwise prepared or shown, and the personal property and contents used in conducting and maintaining any such place for any such purpose. This chapter shall not affect any newspaper, magazine, or other publication entered as second class matter by the post-office department.

§ 3767.02. Nuisance.

Any person, who uses, occupies, establishes, or conducts a nuisance, or aids or abets therein, and the owner, agent, or lessee of any interest in any such nuisance together with the persons employed in or in control of any such nuisance by any such owner, agent, or lessee is guilty of maintaining a nuisance and shall be enjoined as provided in sections 3767.03 to 3767.06, inclusive, of the Revised Code.

§ 3767.03. Abatement of nuisance bond.

Whenever a nuisance exists, the attorney general, the prosecuting attorney of the county in which such nuisance exists, or any person who is a citizen of such county may bring an action in equity in the name of the state, upon the relation of such attorney general, prosecuting attorney, or person, to abate such nuisance and to perpetually enjoin the person maintaining the same from further maintenance thereof. If such action is instituted by a person other than the prosecuting attorney, or attorney general, the complainant shall execute a bond to the person against whom complaint is made, with good and sufficient surety to be approved by the court or clerk thereof, in the sum of not less than five hundred dollars, to secure to the party enjoined the damages he may sustain if such action is wrongfully brought, not prosecuted to final judgment, or is dismissed, or is not maintained, or if it is finally decided that the injunction ought not to have been granted. The

party thereby aggrieved by the issuance of such injunction shall have recourse against said bond for all damages suffered, including damages to his property, person, or character and including reasonable attorney's fees incurred by him in making defense to said action.

§ 3767.04 Procedure in injunction action.

The action, provided in section 3767.03 of the Revised Code, shall be brought in the court of common pleas of the county in which the property is located. At the commencement of the action a verified petition alleging the facts constituting the nuisance shall be filed in the office of the clerk of court of common pleas.

After the filing of the petition, application for a temporary injunction may be made to the court or a judge thereof who shall grant a hearing within ten days after the filing. When such application for a temporary injunction is made, the court or judge thereof may, on application of the complainant, issue an ex parte restraining order, restraining the defendant and all other persons from removing or in any manner interfering with the personal property and contents of the place where such nuisance is alleged to exist until the decision of the court or judge granting or refusing such temporary injunction and until the further order of the court thereon. The restraining order may be served by handing to and leaving a copy of such order with any person in charge of such place or residing therein, or by posting a copy thereof in a conspicuous place at or upon one or more of the principal doors or entrances to such place, or by both such delivery and posting. The officer serving such restraining order shall forthwith make and return into court an inventory of the personal property and contents situated in and used in conducting or maintaining such nuisance. Any violation of such restraining order is a contempt of court, and where such order is posted, mutilation or removal thereof, while the same remains in force, is a contempt of court, provided such posted order contains therein a notice to that effect.

A copy of the complaint, together with a notice of the

time and place of the hearing of the application for a temporary injunction, shall be served upon the defendant at least five days before such hearing. If the hearing is then continued at the instance of any defendant, the temporary writ as prayed shall be granted as a matter of course. If upon hearing the allegations of the petition are sustained to the satisfaction of the court or judge, the court or judge shall issue a temporary injunction without additional bond restraining the defendant and any other person from continuing the nuisance. If at the time of granting a temporary injunction, it further appears that the person owning, in control, or in charge of the nuisance so enjoined had received five days' notice of the hearing and unless such person shows to the satisfaction of the court or judge that the nuisance complained of is abated, or that such person proceeded forthwith to enforce his rights under Section 3767.10 of the Revised Code, the court or judge shall forthwith issue an order closing the place against its use for any purpose of lewdness, assignation, or prostitution until final decision is rendered on the application for a permanent injunction. Such order shall also continue in effect for such further period the restraining order above provided if already issued, or, if not so issued, shall include such an order restraining for such period the removal or interference with the personal property and contents located therein. Such restraining order shall be served and the inventory of such property shall be made and filed as provided in this section. The owner of any real or personal property closed or restrained or to be closed or restrained may appear between the filing of the petition and the hearing on the application for a permanent injunction and, upon payment of all costs incurred and upon the filing of a bond by the owner of the real property with sureties to be approved by the clerk in the full value of the property to be ascertained by the court, or, in vacation, by the judge, conditioned that such owner will immediately abate the nuisance and prevent the same from being established or kept until the decision of the court or judge is rendered on the application for a permanent injunction, then the court, or judge in vacation, if

satisfied of the good faith of the owner of the real property and of innocence on the part of any owner of the personal property of any knowledge of the use of such personal property as a nuisance and that, with reasonable care and diligence, such owner could not have known thereof, shall deliver such real or personal property, or both, to the respective owners thereof, and discharge or refrain from issuing at the time of the hearing on the application for the temporary injunction any order closing such real property or restraining the removal or interference with such personal property. The release of any real or personal property, under this section, shall not release it from any judgment, lien, penalty, or liability to which it may be subjected.

§ 3767.05. Priority of action; evidence; costs.

The action, provided for in sections 3767.03 and 3767.04 of the Revised Code, shall be set down for trial at the first term of the court and shall have precedence over all other cases except crimes, election contests, or injunctions. In such action, evidence of the general reputation of the place or an admission or finding of guilt of any person under the criminal laws against prostitution, lewdness, or assignation at any such place is admissible for the purpose of proving the existence of said nuisance and is prima-facie evidence of such nuisance and of knowledge of and of acquiescence and participation therein on the part of the person charged with maintaining said nuisance. If the complaint is filed by a person who is a citizen of the county it shall not be dismissed except upon a sworn statement by the complainant and his attorney, setting forth the reason why the action should be dismissed and the dismissal approved by the prosecuting attorney in writing or in open court. If the judge is of the opinion that the action ought not to be dismissed, he may direct the prosecuting attorney to prosecute said action to judgment at the expense of the county, and if the action is continued more than one term of court, any person who is a citizen of the county, or has an office therein, or the attorney general or the prosecuting attorney, may be substituted for the com-

plainant and prosecute said action to judgment. If the action is brought by a person who is a citizen of the county and the court finds that there were no reasonable grounds or cause for said action, the costs may be taxed to such person. If the existence of the nuisance is established upon the trial, a judgment shall be entered which shall perpetually enjoin the defendant and any other person from further maintaining the nuisance at the place complained of and the defendant from maintaining such nuisance elsewhere.

§ 3767.06. Content of judgment and order.

If the existence of a nuisance is admitted or established in an action as provided in sections 3767.01 to 3767.11, inclusive, of the Revised Code, or in a criminal proceeding, an order of abatement shall be entered as a part of the judgment in the case, which order shall direct the removal from the place of all personal property and contents used in conducting the nuisance, and not already released under authority of the court as provided in section 3767.04 of the Revised Code, and shall direct the sale of such thereof as belong to the defendants notified or appearing, in the manner provided for the sale of chattels under execution. Such order shall also require the renewal for one year of any bond furnished by the owner of the real property, as provided in section 3767.04 of the Revised Code, or, if not so furnished shall continue for one year any closing order issued at the time of granting the temporary injunction, or, if no such closing order was then issued, shall include an order directing the effectual closing of the place against its use for any purpose, and keeping it closed for a period of one year unless sooner released. The owner of any place closed and not released under bond may then appear and obtain such release in the manner and upon fulfilling the requirements provided in section 3767.04 of the Revised Code. The release of the property under this section shall not release it from any judgment, lien, penalty, or liability to which it may be subject. Owners of unsold personal property and contents so seized must appear and claim the same within ten days

after such order of abatement is made and prove innocence, to the satisfaction of the court of any knowledge of said use thereof and that with reasonable care and diligence they could not have known thereof. Every defendant in the action is presumed to have had knowledge of the general reputation of the place. If such innocence is established, such unsold personal property and contents shall be delivered to the owner, otherwise it shall be sold as provided in this section. For removing and selling the personal property and contents, the officer shall be entitled to charge and receive the same fees as he would for levying upon and selling like property on execution; and for closing the place and keeping it closed, a reasonable sum shall be allowed by the court.

§ 3767.07. Court shall punish offender for violation of injunction or order.

In case of the violation of any injunction or closing order granted under sections 3767.01 to 3767.11, inclusive, of the Revised Code, or of a restraining order or the commission of any contempt of court in proceedings under such sections, the court or, in vacation, a judge thereof, may summarily try and punish the offender. The trial may be had upon affidavits or either party may demand the production and oral examination of the witnesses.

§ 3767.08 Tax when permanent injunction issues; payment.

Whenever a permanent injunction issues against any person for maintaining a nuisance, there shall be imposed upon said nuisance and against the person maintaining the same a tax of three hundred dollars. Such tax may not be imposed upon the personal property or against the owner thereof who has proved innocence as provided in section 3767.06 of the Revised Code, or upon the real property or against the owner thereof who shows to the satisfaction of the court or judge thereof at the time of the granting of the permanent injunction, that he has, in good faith, permanently abated the nuisance complained

of. The imposition of said tax shall be made by the court as a part of the proceeding and the clerk of said court shall make and certify a return and the imposition of said tax thereon to the county auditor, who shall enter the same as a tax upon the property and against the persons upon which or whom the lien was imposed as and when other taxes are entered, and the same shall be and remain a perpetual lien upon all property, both personal and real, used for the purpose of maintaining said nuisance except as excepted in this section until fully paid. Any such lien imposed while the tax books are in the hands of the auditor shall be immediately entered therein. The payment of said tax shall not relieve the persons or property from any other taxes. The provisions of the laws relating to the collection of taxes in this state, the delinquency thereof, and sale of property for taxes shall govern in the collection of the tax prescribed in this section in so far as the same are applicable, and the said tax collected shall be applied in payment of any deficiency in the costs of the action and abatement on behalf of the state to the extent of such deficiency after the application thereto of the proceeds of the sale of personal property, and the remainder of said tax, together with the unexpended portion of the proceeds of the sale of personal property shall be distributed in the same manner as fines collected under section 2905.14 of the Revised Code.

§ 3767.09. Tax shall be imposed against owner of property.

When a nuisance is found to exist in any proceeding under sections 3767.01 to 3767.11, inclusive, of the Revised Code, and the owner or agent of such place whereon the same has been found to exist was not a party to such proceeding, and did not appear therein, the tax of three hundred dollars, imposed under section 3767.08 of the Revised Code, shall, nevertheless, be imposed against the persons served or appearing and against the property as set forth in this section. Before such tax is enforced against such property, the owner or agent thereof shall have appeared therein or shall be served with summons

therein, and existing laws, regarding the service of process, shall apply to service in proceedings under sections 3767.01 to 3767.11, inclusive, of the Revised Code. The person in whose name the real estate affected by the action stands on the books of the county auditor for purposes of taxation is presumed to be the owner thereof, and in case of unknown persons having or claiming any ownership, right, title, or interest in property affected by the action, such may be made parties to the action by designating them in the petition as "all other persons unknown claiming any ownership, right, title, or interest in the property affected by the action." Service thereon may be had by publication in the manner prescribed in sections 2703.14 to 2703.19, inclusive, of the Revised Code. Any person having or claiming such ownership, right, title, or interest, and any owner or agent in behalf of himself and such owner may make defense thereto and have trial of his rights in the premises by the court and if said cause has already proceeded to trial or to findings and judgment, the court shall, by order, fix the time and place of such further trial and shall modify, add to, or confirm such findings and judgment. Other parties to said action shall not be affected thereby.

§ 3767.10. Lease void if building used for lewd purposes.

If a tenant or occupant of a building or tenement, under a lawful title, uses such place for the purposes of lewdness, assignation, or prostitution, such use makes void the lease or other title under which he holds, at the option of the owner, and, without any act of the owner, causes the right of possession to revert and vest in such owner, who may without process of law make immediate entry upon the premises.

§ 3767.11. Procedure when nuisance established in criminal proceeding.

In case the existence of a nuisance is established in a criminal proceeding, the prosecuting attorney shall pro-

ceed promptly, under sections 3767.01 to 3767.11, inclusive, of the Revised Code, to enforce such sections, and the finding of the defendant guilty in such criminal proceedings, unless reversed or set aside, shall be conclusive as against such defendant as to the existence of the nuisance. All moneys collected under such sections shall be paid to the county treasurer. The proceeds of the sale of the personal property, as provided in section 3767.06 of the Revised Code, shall be applied in payment of the costs of the action and abatement including the complainant's costs or so much of such proceeds as may be necessary, except as provided in sections 3767.07 to 3767.11, inclusive, of the Revised Code.

§ 3767.99. Penalties.

(A) Whoever is guilty of contempt under sections 3767.01 to 3767.11, inclusive, of the Revised Code, shall be fined not more than one thousand dollars or imprisoned not more than six months, or both.

(B) Whoever violates section 3767.12 of the Revised Code shall be fined not more than one hundred dollars or imprisoned not more than six months, or both.

(C) Whoever violates section 3767.13 of the Revised Code shall be fined not more than five hundred dollars.

(D) Whoever violates section 3767.14 of the Revised Code shall be fined not less than fifty nor more than one thousand dollars.

(E) Whoever violates section 3767.16 of the Revised Code shall be fined not less than ten nor more than fifty dollars, and in default of the payment of such fine and costs, such person shall be imprisoned not more than thirty days.

(F) Whoever violates section 3767.17 of the Revised Code shall be fined not less than ten nor more than one hundred dollars.

§2907.01 Definitions. As used in sections 2907.01 to 2907.37 of the Revised Code:

(A) "Sexual conduct" means vaginal intercourse between a male and female, and anal intercourse, fellatio, and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

(B) "Sexual contact" means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if such person is a female, a breast, for the purpose of sexually arousing or gratifying either person.

(C) "Sexual activity" means sexual conduct or sexual contact, or both.

(D) "Prostitute" means a male or female who promiscuously engages in sexual activity for hire, regardless of whether the hire is paid to the prostitute or to another.

(E) Any material or performance is "harmful to juveniles," if it is offensive to prevailing standards in the adult community with respect to what is suitable for juveniles, and if any of the following apply:

(1) It tends to appeal to the prurient interest of juveniles;

(2) It contains a display, description, or representation of sexual activity, masturbation, sexual excitement, or nudity;

(3) It contains a display, description, or representation of bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) It contains a display, description, or representation of human bodily functions of elimination;

(5) It makes repeated use of foul language;

(6) It contains a display, description, or representation in lurid detail of the violent physical torture, dismemberment, destruction, or death of a human being;

(7) It contains a display, description, or representation of criminal activity which tends to glorify or glamorize such activity, and which with respect to juveniles has a dominant tendency to corrupt.

(F) When considered as a whole, and judged with reference to ordinary adults, or, if it is designed for sexual deviates or other specially susceptible group, judged with reference to such group, any material or performance is "obscene" if any of the following apply:

(1) Its dominant appeal is to prurient interest;

(2) Its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way which tends to represent human beings as mere objects of sexual appetite;

(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way which inspires disgust or revulsion in persons with ordinary sensibilities, wtihout serving any genuine scientific, educational, sociological, moral, or artistic purpose;

(5) It contains a series of displays or descriptions of sexual activity, masturbation, sexual excitement, nudity, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient or scatological interest, when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral, or artistic purpose.

(G) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(H) "Nudity" means the showing, representation, or depiction of human male or female genitals, pubic area,

or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering of any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.

(I) "Juvenile" means an unmarried person under the age of eighteen.

(J) "Material" means any book, magazine, newspaper, pamphlet, poster, print, picture, figure, image, description, motion picture film, phonographic record or tape, or other tangible thing capable of arousing interest through sight, sound, or touch.

(K) "Performance" means any motion picture, preview, trailer, play, show, skit, dance, or other exhibition performed before an audience.

§2907.32 Pandering obscenity.

(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

(1) Create, reproduce, or publish any obscene material, when the offender knows that such material is to be used for commercial exploitation or will be publicly disseminated or displayed, or when he is reckless in that regard;

(2) Exhibit or advertise for sale or dissemination, or sell or publicly disseminate or display any obscene material;

(3) Create, direct, or produce an obscene performance, when the offender knows that it is to be used for commercial exploitation or will be publicly presented, or when he is reckless in that regard;

(4) Advertise an obscene performance for presentation, or present or participate in presenting an obscene performance, when such performance is presented publicly, or when admission is charged;

(5) Posses or control any obscene material with purpose to violate division (A) (2) or (4) of this section.

(B) It is an affirmative defense to a charge under this section, that the material or performance involved was disseminated or presented for a bona fide medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in such material or performance.

(C) Whoever violates this section is guilty of pandering obscenity, a misdemeanor of the first degree. If the offender has previously been convicted of a violation of this section or of section 2907.31 of the Revised Code, then pandering obscenity is a felony of the fourth degree.

APPENDIX C

Notice of Appeal to the Supreme Court of the United States

(Filed June 13, 1974)

No. 71-649

IN THE SUPREME COURT OF OHIO

(Title omitted in printing)

Notice is hereby given that Art Theatre Guild, Inc., James Wescott and Tonylyn Productions, Inc., the above named appellants, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Ohio modifying, and affirming as modified, the judgment of the Court of Appeals of Lucas County entered in this action February 7, 1974 and its denial of a motion for a new hearing April 4, 1974.

This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

BERNARD A. BERKMAN
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PROOF OF SERVICE

Copies of the within Notice of Appeal were served upon Warren D. Wolfe, 2001 Toledo Trust Building, Toledo, Ohio 43604, John F. Wetli, 2001 Toledo Trust Building, Toledo, Ohio 43604 and James J. Clancy, 9055 LaTuna Canyon, Sun Valley, California, attorneys for appellees, by depositing same in a U.S. Post Office mail box, so addressed, with air mail first class or first class postage prepaid where applicable pursuant to Rule 33 United States Supreme Court Rules, this 12th day of June, 1974.

/s/ BERNARD A. BERKMAN
Counsel for Appellants

APPENDIX D

Order of Ohio Supreme Court

(Filed February 27, 1974)

No. 71-649

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO *ex rel.* CLARK L. EWING,
Appellee,

vs.

A MOTION PICTURE FILM ENTITLED
"WITHOUT A STITCH," *et al.,*
Appellants.

This cause, heard on appeal from the Court of Appeals for Lucas County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is modified, and as modified, affirmed for the reasons set forth in the opinion rendered herein and it appearing that there were reasonable grounds for this appeal, it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Lucas County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and seal of the Court this 27 day of February 1974.

/s/ THOMAS L. STARTZMAN
Clerk

APPENDIX E

Mandate of Ohio Supreme Court

(Filed February 27, 1974)

No. 71-649

IN THE SUPREME COURT OF OHIO
(Title omitted in printing)

To the Honorable Common Pleas Court within and for the County of Lucas, Ohio, Greetings:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

The judgment of the Court of Appeals is modified to reflect our holding that the trial court should have dismissed appellee's demand for forfeiture of all business office receipts derived from the exhibition of the film, and as modified, the judgment of the Court of Appeals is affirmed for the reasons set forth in the opinion rendered herein.

THOMAS L. STARTZMAN,
Clerk

APPENDIX F

Order of Ohio Supreme Court Denying Rehearing

(Filed April 4, 1974)

No. 71-649

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO *ex rel.* CLARK L. EWING,
Appellee,

vs.

A MOTION PICTURE FILM ENTITLED,
"WITHOUT A STITCH," *et al.*,
Appellants.

REHEARING

It is ordered by the court that rehearing in this case is denied.

(Duly certified)

APPENDIX G

Opinion of the Court of Appeals of Lucas County, Ohio

(Decided July 9, 1971)

(Title omitted in printing)

HEADNOTES

Applying the tests set forth in Roth v. United States, 354 U.S. 476, 1 L.Ed. 2d 1498, 77 S.Ct. 1304 (1957) and in A Book Named "John Cleland's Memoirs of a Woman of Pleasure," et al., Appellants, v. Attorney General of the Commonwealth of Mass., 383 U.S. 413, 16 L.Ed. 2d. 1, 86 S.Ct. 975 (1966), the motion picture film "Without a Stitch" is obscene and the public exhibiting of it is a nuisance under the applicable provisions of Chapter 3767, R.C. Said provisions are constitutional; and when a permanent injunction is issued in a civil action for maintaining a nuisance, an order directing the effectual closing of the place, R.C. 3767.06, and imposing a tax, R.C. 3767.08-09, is mandatory.

Appeal on Questions of Law and Fact.

Messrs. Bugbee & Conkle and Mr. James Clancy for appellee.

Messrs. Fuhrman, Gertner, Britz & Barkan and Mr. Edmund C. Grainger, Jr., for appellants.

POTTER, *P.J.* This cause is before this court de novo. We have reviewed and weighed the evidence submitted in the court below and in this court. Fortunately, after July 1, 1971, the anomalous practice of one trial and one trial de novo is abolished, Rule 2, Ohio Rules of Appellate Procedure.

The case comes to this court on the complaint of the petitioner for an injunction to enjoin the exhibition of the motion picture film, "Without a Stitch," and to abate the same as a public nuisance in the City of Toledo, Ohio, pursuant to R.C. 3767.01 et seq. Answers were filed by the defendants James Westcott, Art Theatre Guild, Inc., and Tonylyn Productions, Inc. Mr. Westcott is the manager

of the theatre; Art Theatre Guild, Inc., is a corporation organized under the laws of Ohio and operates the Westwood Art Theatre and is wholly owned by Louis K. Sher. The defendant Tonylyn Productions, Inc., is a corporation organized under the laws of the state of California and it owns the distribution rights in and to the said film. Although we are to treat this case as if the cause had never been tried below (See *Lincoln Properties v. Goldsiager*, 18 Ohio St. 2d 154 (1969)), we note that the court below permanently enjoined the defendants and all persons acting for them from exhibiting the subject motion picture film, and that the defendants filed an appeal bond in the amount of $20,000 to perfect their appeal on law and fact and also to stay the execution of the lower court's injunction until final adjudication in the appellate courts of this state, including the Supreme Court of Ohio.

The essential issue before this Court is whether the film "Without a Stitch" is obscene and, therefore, subject to the provisions of R.C. 3767.01, et seq. To the extent the term "obscene" has been defined or is capable of definition, we look to *Roth v. United States*, 354 U.S. 476, 1 L.Ed.2d 1498, 77 S.Ct. 1304 (1957) and as further elaborated in, *A Book Named "John Cleland's Memoirs of a Woman of Pleasure," et al., Appellants, v. Attorney General of the Commonwealth of Mass.*, 383 U.S. 413, 16 L.Ed.2d 1, 86 S. Ct. 975 (1966).

After reviewing the varied decisions since *Roth*, we appreciate the exasperation of some judges and authors when they suggest that the law is in a fragmented state of bewilderment. After such an examination, Justice Stewart's observation that "But I know it when I see it * * *", takes on new dimensions. It is not the purpose of this opinion to add to the already voluminous array of comment on this subject, but to set forth for property interested parties our reasoning, findings and conclusions.

In *Roth, supra*, Mr. Justice Brennan, who delivered the opinion of the court, made the following observations at page 484: "But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance," and then held the following

at page 485: "We hold that obscenity is not within the area of constitutionally protected speech or press." In *Roth*, also, was the answer to the presentation of obscenity in a closed theatre to consenting adults. Justice Brennan rejected this argument and proof of a clear and present danger of antisocial conduct is not required. In support thereof he cited *Beauharnais v. Illinois*, 343 U.S. 250.

The test laid down by *Roth* is found at page 489 of the opinion, as follows:

> "* * * whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest * * *."

The court, in *Memoirs, supra* (1966), seized upon the words of the *Roth* case "* * * utterly without redeeming social importance" and fashioned the following definition of obscenity with three elements which must coalesce, 16 L. Ed. 2d. 1, at page 5:

> "* * * it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

This definition was quoted with approval in *State v. Mazes*, 7 Ohio St. 2d. 136, at page 137; reversed on other grounds, 388 U.S. 453, 18 L. Ed. 2d. 1315, 87 S. Ct. 2105.

In close cases it has been suggested that evidence of pandering may be probative with respect to the nature of the material in question. *Ginsburg v. United States*, 383 U.S. 463, 86 S. Ct. 942, 16 L. Ed. 2d. 31 (1966); *P.B.I.C., Inc. v. Byrne*, 313 Fed. Supp. 757 (1970).

The case of *Stanley v. Georgia* (1969), 394 U.S. 557, 22 L. Ed. 2d. 542, 89 S. Ct. 1243, considered the private possession of obscene material, and the Supreme Court of the United States found that his was a protected activity. The court in that case reiterated that *Roth* still stood;

however, some scholars and judges, although we do not mean to imply that the two categories cannot coalesce, thought that they noted a hole in the dike. Thereafter, the country was inundated by a flood of obscenity and approving judicial decisions. The varied nature of the subject helped to confuse the issues, e.g., private possession, commercial exploitation, method and type of dissemination, e.g., books, pictures, movies, live presentation. See 50 *Am. Jur.* 2d 481, Lewdness, Indecency, and Obscenity, par. 26, re Motion Pictures. The individual positions of the Justices of the Supreme Court, plus a rash of per curiam reversals of state decision, helped spawn conflicting appellate decisions before and after Stanley. *Jacobellis v. Ohio*, 378 U.S. 184, 12 L. Ed. 2d. 793, 84 S. Ct. 1676, *United States v. Klaw* (1965), 350 F.2d 155.

Two recent Supreme Court cases have done much to bring some semblance of order to the morass of obscenity decisions. The cases decided after the decision in the Lucas County Common Pleas Court support that decision and they are *United States v. Reidel* (May 1971), ___ U.S. ___, 28 L. Ed. 2d 813, 91 S. Ct. ___; and *United States v. Thirty-seven (37) Photographs, Milton Luros, Claimant*, ___ U.S. ___, 28 L. Ed. 2d. 822, 91 S. Ct. ___ (May 1971). These cases refuted the argument that *Stanley*, in effect, emasculated *Roth*. The principles of *Roth* are reaffirmed and *Stanley* is limited to the facts of that case. A "poor Stanley," constitutionally, may not have obscenity commercially distributed to him. In *Reidel*, 28 L. Ed. 2d. at page 816, the court said, "obscenity is not within the area of constitutionally protected speech or press," and then quoted *Stanley*, at page 817, as follows: "Roth and the cases following that decision are not impaired by today's holding. As we have said, the states retain broad powers to regulate obscenity. * * *" In reference to the District Court, and perhaps other courts which have given *Stanley* too wide a sweep, see the following from *Reidel* at page 817:

> "* * * To extrapolate from Stanley's right to have and peruse obscene material in the privacy of

his own home a First Amendment right in Reidel to sell it to him would effectively scuttle Roth, the precise result that the Stanley opinion adjured. Whatever the scope of the 'right to receive' referred to in Stanley, it is not so broad as to immunize the dealings in obscenity in which Reidel engaged here—and dealings which Roth held unprotected by the First Amendment."

And at page 818:

"Roth and like cases have interpreted the First Amendment not to insulate obscenity from statutory regulations."

In the concurring opinion by Mr. Justice Harlan we find the following at page 818:

"Appellee here contends, in effect that the Stanley 'right to receive' language, 394 U.S. at 564-565, 22 L. Ed. 2d. at 549, constituted recognition that obscenity was constitutionally protected for its content. Governmental efforts to proscribe obscenity as such would, on this interpretation, not be constitutional; rather, the power of both the state and federal governments would now be restricted to the regulation of the constitutionally protected right to engage in this category of 'speech' in light of otherwise permissible state interests, such as the protection of privacy or the protection of children.

"That interpretation of Stanley, however, is flatly inconsistent with the square holding of Roth v. United States, 354 U.S. 476, 485, 1 L. Ed. 2d. 1498, 1507, 77 S. Ct. 1304 (1957): * * *

"Either Roth means that government may proscribe obscenity as such rather than merely regulate it with reference to other state interests, or Roth means nothing at all. * * *"

In *United States v. Thirty-Seven (37) Photographs*, 28 L. Ed. 2d 822, in reference to the commercial distribution of obscenity the court's observations at page 834 are appropriate.

"* * * Stanley's emphasis was on the freedom of thought and mind in the privacy of the home. But a port of entry is not a traveler's home. * * * Whatever the scope of the right to receive obscenity adumbrated in Stanley, that right, as we said in Reidel, does not extend to one who is seeking, as was Luros here, to distribute obscene materials to the public, nor does it extend to one seeking to import obscene materials from abroad, whether for private use or public distribution."

With this review we turn to the question of whether the plaintiff has carried his burden of proof. The evidence consisted of testimony, exhibits, and the viewing of the film by this Court at the request of all the parties. Despite this request, the defendants argue that this Court cannot consider this film as evidence, but that we must consider the viewing as if it were only a view of the place to enable us to better apply the evidence offered. In short, the defendants say that we cannot believe our eyes, an argument advanced with some success by the weavers of the king's clothes in the tale, *The Emporer's New Clothes*, written by an earlier Danish author, Hans Christian Andersen. This Court does not need a little boy's exclamation to establish that the king, in fact, had nothing on.

The cases clearly establish the right, if not the necessity, of the court to view the material; this the court has done. (See *Jacobellis v. Ohio*, (1964), 378 U.S. 174, 12 L. Ed. 2d. 793, 84 S. Ct. 1676; *Womack v. United States*, Court of Appeals, Dist. of Columbia (1961), 294 F. 2d. 204; *Evans Theatre Corp., et al., v. Slayton* (1971), S. Ct. of Georgia, 180, S.E. 2d. 712; *Kahm v. United States*, 300 F. 2d. 78.)

By any test, medium-core, hard-core, as if res ipsa loquitur, obscenity per se, patently obscene, or screaming obscenity, the film was obscene. (See *State, ex rel., Sensenbrenner, v. Adult Bookstore* (1971), 26 Ohio App. 2d. 183; *Jacobellis v. Ohio* (1964), 378 U.S. 184, 12 L. Ed. 2d. 793, 84 S. Ct. 1676; *United States v. Klaw* (1965), 350 F. 2d. 155; *Morris v. United States*, 259 A. 2d. 337 (1969),

Dist. Court of Columbia Court of Appeals; Womack v. United States (1961), 294 F. 2d. 204; *Dunn v. Maryland State Board of Censors*, 213 A. 2d. 751 (1965)). However, considering the evidence and applying the tests as enumerated in *Roth v. United States, supra*, and as further elaborated in *Memoirs, supra*, we find that to the average person applying national contemporary community standards that the dominant theme of the film, taken as a whole, appeals to a prurient interest in sex, that the film goes substantially beyond customary limits of candor and affronts contemporary community standards relating to the description or representation of sexual matters; that the film is utterly without redeeming social value, that the three elements coalesce, and that the film, "Without a Stitch," is obscene. We have also considered as indicative but not conclusive of national standards the laws of the state of Ohio[1] and other states. See *Roth, supra*, page 485.

Briefly we state that the so-called "plot" is as follows: The principal participant is an unmarried, 17-and-a-half year old girl about to be a senior in high school. She found that when confronted with intimate relations with a male classmate she became frigid. To overcome what she concludes is an unusual attitude, she visits a doctor. The doctor proceeds to effect a cure, which cure includes a variety of sexual stimulations, including intercourse. Without his white coat and when the doctor was in the nude giving therapeutic treatment, with his numerous tattoos, he appeared to have interned with the Danish Merchant Marine. After treatment the young girl started on a hitchhiking tour of Europe to further effect her cure. Defendants argue that the scenery and photography was very good and this gives to the picture some redeeming social value. The photography is good and the scenery is interesting, but this is not a travelogue, and when the sun slowly sets in the west, it ushers in another night of sexual excess and aberration. This included nude scenes of vaginal and anal copulation, lesbian relations, participation in a "stag" film, fellatio, cunnilingus, and sex orgies between two women and a male, and two males and the "star" of the production, the display of a dildo, sadism and masochism. All

acts were simulated except the fondling and suckling of the patient's breast by the doctor. It is obvious that the presentation was to appeal to titillation, not travel.

As cured, the patient returns to her doctor to exhibit her new found radiant health and peace of mind. We find no social redeeming value in this film. If there is a plot, it was only a facade or pretext to exhibit what for years has been known as a "stag" film.

We find, further, that the defendants were pandering as defined in *Ginsburg v. United States, supra.* The defendants' sole emphasis was on the sexual, provocative aspects of this film. The advertising and promotional materials were slanted to appeal to the erotic interests of their customers.

Since this action is brought under R.C. 3767.01, et seq., we set forth the applicable provisions.

R.C. 3767.01:

"(C) 'Nuisance' means that which is defined and declared by statutes to be such and also means any place in or upon which lewdness, assignation, or prostitution is conducted, permitted, continued, or exists, or any place, in or upon which lewd, indecent, lascivious, or obscene films or plate negatives, film or plate positives, films designed to be projected on a screen for exhibition films, or glass slides either in negative or positive form designed for exhibition by projection on a screen, are photographed, manufactured, developed, screened, exhibited, or otherwise prepared or shown, and the personal property and contents used in conducting and maintaining any such place for any such purpose. * * *"

R.C. 3767.02:

"Any person, who uses, occupies, establishes, or conducts a nuisance, or aids or abets therein, and the owner, agent, or lessee of any interest in any such nuisance together with the persons employed in or in control of any such nuisance by any such owner, agent, or lessee is guilty of maintaining a nuisance

and shall be enjoined as provided in sections 3767.03 to 3767.06, inclusive, of the Revised Code."

Under the conditions set forth in R.C. 3767.03, any person of the county may bring in action in equity in the name of the state to abate the nuisance. The states have a choice of remedies with injunction being one. See *Kingsley Books, Inc., v. Brown* (1957), 354 U.S. 436, 1 L. Ed. 2d 1469, 77 S. Ct. 1325; *People v. Linn* (1941), 18 Cal. 2d 872, 118 P.2d 472; *Evans Theatre Corp., et al., v. Slayton* (1971), ___ Georgia ___, 180 S.E.2d 712; 50 *Am. Jur.* 2d 464, Lewdness, Indecency and Obscenity, Par. 10.

The statute is a constitutionally permissible means of controlling obscenity. See 34 *O. Jur.* 2d 160, Lewdness, Indecency, Obscenity, and Profanity, Par. 8; *Grove Press, Inc., et al., v. Anthony B. Flask,* Civ. No. C 69-735, Dist. Ct. Northern Dist. of Ohio, Eastern Div.

Having found the film obscene, we also find that a nuisance, as defined in R.C. 3767.01, was maintained, the applicable provisions of R.C. 3767.01 et seq., are invoked and are mandatory. We permanently enjoin the defendants, and each and all persons acting for them, from exhibiting the subject motion picture film, the Westwood Art Theatre where the film was exhibited is ordered closed for one year from the date of the judgment entry to be filed in this court (R.C. 3767.06); a tax of $300.00 is imposed on the defendants and against the real property upon which is located the Westwood Art Theatre (R.C. 3767.08). The lower court having enjoined the exhibiting of the film and the defendants desiring to stay the execution of the order of injunction in order to continue to exhibit the film pending appeal filed a bond and the court stayed the enforcement (See 29 *O. Jur.* 2d 410, Injunctions, Par. 181, as to the terms and conditions of a decree or order). The defendants shall now account for the box office receipts arising out of the exhibiting of the motion picture film entitled "Without a Stitch," from the effective date of the court of common pleas order enjoining the presentation of the film, September 19, 1970, up to and including the final performance. The majority of the court are of the opinion that not to sequester the receipts would render the lower court's

order a nullity. The box office receipts shall be paid to the Lucas County Treasurer, the costs are assessed against the defendants. Counsel for the plaintiff will prepare a judgment entry to be submitted to counsel for defendants.

WILEY, J., concurs.

BROWN, J., concurring in part, and dissenting in part.

I concur in the granting of the permanent injunction against defendant and the other remedial relief provided by Chapter 3767, Revised Code, and stated in the last paragraph of the majority opinion, and accept the excellent analysis of the law leading to the final judgment, but I dissent from that part of the judgment which orders the defendants to account for the box office receipts arising from exhibition of the film from the date of the common pleas court injunction on September 19, 1970, up to and including the final performance.

The only hinge upon which such an accounting order for box office receipts could swing is the common pleas court injunction order of September 16, 1970, which, inter alia, provides:

> "* * * And said permanent injunction is to issue and become effective three days from the date of the filing of this order unless the defendants jointly, or any one of them, deposit an appeal bond in the amount of $20,000.00 to stay execution until final adjudication in the Appellate Courts of this State.
>
> The question of forfeiture as prayed for in the petition is stayed, pending final adjudication. * * *"

and the appeal bond filed on September 16, 1970, pursuant to this common pleas injunction decree, which, inter alia, provides:

> "In the event that there is a final affirmance of the judgment of said Court of Common Pleas of Lucas County, Ohio, and said defendant, and/or any other defendants, pay all court costs and damages or forfeitures which may be assessed by said Court of Common Pleas then this obligation shall be void; * * *"

Such a hinge is insufficient to swing such a sweeping relief as an accounting for profits or receipts which, in substance, amount to a forfeiture or penalty. This is so for a number of reasons.

The foregoing decree, and the appeal bond, even if it is considered a contract by the defendants to pay a forfeiture which may be assessed upon affirmance upon appeal, is the only slender reed upon which the forfeiture decree of box office receipts is based. There is no lawful authority or foundation, statutory or otherwise, creating such a right or remedy of forfeiture. The parties cannot, by a contract, whether it be an appeal bond or otherwise, create jurisdiction by way of a new right or remedy such as forfeiture and agree to give a court such jurisdiction where no such right, remedy, authority or jurisdiction exists independently. 31 *O. Jur.* 2d 518, Sec. 28.

Chapter 3767, Nuisances, Ohio Revised Code, under which the present injunction proceedings were maintained, provides for various remedies, in addition to permanent injunctive relief, such as is granted in the last paragraph of the majority opinion based upon Secs. 3767.06 and 3767.09, Ohio Revised Code. However, in this statutory structure for relief in nuisance cases there is singularly and glaringly absent any statutory provision for accounting for and paying over to the county treasurer or any other public body or officer the box office receipts arising out of exhibition of the film, which amounts to a forfeiture or penalty. Expressio unius est exclusio alterius. 50 *O. Jur.* 2d 165, Sec. 188. A strict construction is generally accorded statutes which impose restrictions upon the use of private property, which, in general, interfere with private property rights or which permit the summary divestiture of title to property. *Perkins v. Hattery,* 106 App. 361, 50 *O. Jur.* 2d 273, Statutes, Sec. 289.

Only where a penalty or forfeiture is mandatorily fixed by statute will equity, as a rule, apply the requirement of the statute. *Miller Oil Co. v. Abrahamson,* 252 Iowa 1058, 109 N.W.2d 610; *State v. 1920 Studebaker Touring Car,* 251 P. 701, 120 Oregon 254; *People v. Laport,* 28 Ill. App. 2d 139, 171 N.E.2d 95; 20 *O. Jur.* 2d 84, Sec. 37;

27 *Am. Jur.* 2d 606, Sec. 84; 66 *CJS* 934, Sec. 130.

In the absence of authority duly delegated to a court of equity, such court does not have equitable power or jurisdiction to enforce a forfeiture against the property such as a forfeiture of the profits accruing from property decreed to be a nuisance. 41 *O. Jur.* 2d 169, Nuisances, Sec. 75; 39 *Am. Jur.* 442, 446, Secs. 171 and 173; 66 *CJS* 934, Nuisances, Sec. 130.

Further, even if there is power to assess or determine a forfeiture on the basis of agreement of the defendant as expressed in the appeal bond, in consideration of a stay of execution (and this is gravely doubtful), that upon final affirmance of the judgment of the court of common pleas the defendants "pay all court costs and damages or forfeitures which may be assessed by said court of common pleas" cannot support an interpretation extended to mean that defendants agreed to a forfeiture to be assessed by the Court of Appeals as is done in the present case.

The order for an accounting of box office receipts is predicated, as indicated in the last paragraph of the majority opinion, upon 29 *O. Jur.* 2d 410, Injunctions, Sec. 181, which is entitled "Terms and Conditions of Decree or Order" and concerns itself with the conceded power of a court of equity in granting an injunction to attach to it, as a condition precedent to its effect, terms and limitations designed to serve the ends of justice. *State ex rel. Cleveland Court of Appeals,* 104 Ohio St. 96. This principle is sound law but wholly unrelated to the present case. The trial judge's injunction order, the pertinent parts being recited in the third paragraph of this concurring opinion, is entirely silent on the terms and conditions of the appeal bond and does not state that an accounting of box office receipts should be a condition of the appeal bond, and, on the contrary, states that the question of forfeiture "is stayed, pending final adjudication," whatever that means.

Neither is there anything in the transcript and pleadings of the common pleas court stating that an accounting for box office receipts or forfeiture thereof is made by order of the common pleas court a condition of the appeal

bond staying execution of the judgment. The fact that the appellant and his company surety inserted the clause "forfeitures which may be assessed in said common pleas court" in the appeal bond does not make it a condition of the appeal bond "as is directed by the court making the order which is sought to be superseded" as provided by section 2505.09, R.C., or "as the court may provide" as authorized by section 2505.14, R.C., or "on such terms as are prescribed by the court in which the appeal is filed" as authorized by section 2505.17, R.C. *Booher v. Lowe*, 79 App. 490; 3 *O. Jur.* 2d 248, Appellate Review, Sec. 346, Conditions and Requisites of Bond.

Furthermore, the insertion of the clause concerning "forfeitures" as part of the conditions in the appeal bond is contrary to the mandatory statutory provisions of Sec. 2505.14, R.C., regulating the conditions of an appeal bond operating as a stay of execution, which provides, inter alia, as follows:

> "* * * shall be * * * subject to a condition to the effect that the party appealing shall abide and perform the order and judgment of the appellate court and pay all money, costs, and damages which may be required of or awarded against him upon the final determination of said appeal * * *"

Hence, the common pleas court did not provide or prescribe or direct by order that the appeal bond contain a condition therein that defendants pay any forfeitures assessed (See *Booher v. Lowe, supra*) and, secondly, the common pleas court was mandatorily precluded by Sec. 2505.14, R.C., from making assessment of forfeitures a condition of the appeal bond.

Therefore, the reference to "forfeitures" in the injunction decree of the common pleas court and in the appeal bond filed in that court is a nullity and meaningless. In passing, the observation should also be made that the common pleas court did not determine or assess any forfeiture but postponed it pending appeal.

There is no Ohio case that has established as a principle of law that an injunction decree abating a nuisance

carries with it an ancillary right to a forfeiture of the profit which arose from the nuisance abated. 41 *O. Jur.* 2d 167 et seq., Nuisances, Secs. 73, 74, 75; 29 *O. Jur.* 2d 409 et seq., Injunctions, Secs. 180 to 183 inclusive; 20 *O. Jur.* 2d 85 et seq., Equity, Secs. 39 and 40. This is true of the law generally in the United States. A court, in granting equitable relief by injunction, may impose such terms and conditions as are demanded by justice and regard for righteous conduct, but it may not impose conditions which lie outside its judicial power. *White v. Massee,* 202 Iowa 1304, 211 N.W. 339, 66 ALR 1434; 42 *Am. Jur.* 1101, Injunctions, Sec. 301, Terms and Conditions; 43 *CJS* 951, Sec. 217.

Although a court of equity has judicial power to abate a nuisance by injunction and the right to private property are subservient to the public right to be free from nuisances, which may be abated without compensation to the owner of the offending property, yet the guarantee of due process of law prohibits the confiscation or forfeiture of property without compensation except where the property is taken in a valid exercise of the police power. 15A *CJS* 362, Confiscation; 16A *CJS* 915, 1089, Constitutional law, Sec. 645, 679; 36 *Am. Jur.* 2d 611, 622, Forfeitures and Penalties, Secs. 1, 15 and 16; 24 *O. Jur.* 2d 522, 524, Secs. 2 and 4.

The state or municipality may enact laws and ordinances imposing forfeitures on certain classes of acts, and will enforce the peace and dignity of the state or municipality and these laws and ordinances are within the police powers of the state or municipality and valid so long as they are within the specific and clear limitations in the constitution. *Lindsay v. City of Cincinnati,* 172 Ohio St. 137; 24 *O. Jur.* 2d 523, Forfeitures and Penalties, Sec. 3; cf. *Gribes v. Department of Liquor Control,* 153 Ohio St. 77. Forfeitures and penalties are regarded as odious, not being favored either in equity or at law, and statutory provisions for a forfeiture must be strictly construed. *State ex rel. Lukens v. Industrial Commission,* 143 Ohio St. 609; 24 *O. Jur.* 2d 524, Sec. 4; cf. *United*

States v. Lovitt, 328 U.S. 303, 18 ALR2d. 291, and 16 *Am. Jur.* 2d 754, Sec. 413.

Naturally flowing from the foregoing legal proposition is the following principle of law. In the absence of statute or other legislative enactment, the constitutional guarantee of due process of law prohibits the confiscation or forfeiture of property without compensation by order of any court. 16 *Am. Jur.* 2d, 689, 964, Secs. 361 and 550; 36 *Am. Jur.* 2d 622, Sec. 16; 16A *CJS* 913, Sec. 645; 37 *CJS* 6, Sec. 3; cf. *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 1 L. Ed. 2d 1469. That part of the decree in the present case which orders forfeitures of box office receipts violates all the principles and constitutional prohibitions heretofore discussed and contained in the text and cases cited, and is therefore unconstitutional.

Neither can the box office receipts be ordered confiscated or forfeited as contraband, a term sometimes defined as an article which cannot be owned or possessed legally, or such as is capable of use only in the commission of a crime. Box office receipts are not contraband. 17 *CJS* 510.

The decree of this court ordering an accounting and forfeiture of box office receipts, by reason of its unconstitutionality, exceeds the jurisdiction and legitimate powers of this court of appeals and is an open invitation to the party whose property is confiscated to resort to a utilization of an extraordinary writ or remedy to prohibit such unconstitutional confiscation. 44 *O. Jur.* 2d 209, Sec. 26; 28 USCA, Chapter 85, Sec. 1331 and Footnotes 139 and 142, and Sec. 1332, Footnote 156, and Chapter 155, Secs. 2281 and 2283; *Elliott Advertising v. Metropolitan Dade County* (C. Ap. Florida 1970), 425 F.2d 1141.

However, a confiscation or forfeiture of property must occur in the valid exercise of the police power. Such police power regarding confiscation or forfeiture of property requires statutory provisions permitting and regulating the forfeiture proceedings consistent with due process of law, and such statutory provision or a forfeiture must be strictly construed. 24 *O. Jur.* 2d 524, 525, Secs. 4 and 5.

In the instant case there was no statutory remedy or procedure providing for the confiscation or forfeiture of the box office receipts derived from the exhibition of the offending film. Hence, the forfeiture order is a nullity and violates the constitutional guarantee of due process of law. Article I, Secs. 1, 16, and 19, Ohio Constitution; United States Constitution, Article I, Secs. 9 and 10, Fifth and Fourteenth Amendments; 16 *Am. Jur.* 2d 751, Sec. 411, p. 698, Sec. 368.

Too much significance is placed in this case on the language in the common pleas court final decree and in the appeal bond staying execution which provides in effect that: "and or any other defendants pay all court costs and damages or forfeitures which may be assessed by said court of common pleas" in the event of final affirmance of the judgment of the court of common pleas. Suppose the decree and appeal bond had decided that defendants, in addition to paying all costs, damages or forfeitures, would also "pay all fines and penalties and serve all jail sentences that might be imposed by the common pleas court upon affirmance on appeal"? Would this agreement or statement of defendants in the appeal bond and any reference to it in the permanent injunction decree of the common pleas court give the court of appeals or the common pleas court power and jurisdiction to assess a $10,000 fine on any of the defendants or impose a 6-month jail sentence on any defendant? The answer is obviously in the negative. For the same reason the court of appeals and the common pleas court cannot assess a forfeiture or cause a confiscation of property where no such power or jurisdiction has been granted by law to the courts. The defendants, by a statement in the appeal bond, referring to forfeitures, or to any other matter such as crimes or jail sentences, cannot create jurisdiction of the subject matter in a court. In the present case, the court lacks jurisdiction of the subject matter of confiscation or forfeiture of private property of the defendants. Jurisdiction to render judgment in a case in which the court lacks jurisdiction of the subject matter cannot be acquired by consent of the parties. 31 *O. Jur.* 2d 518, Sec. 28.

For the foregoing reasons this Court should make no order concerning confiscation or forfeiture of the box office receipts obtained by exhibiting the offending film in this case.

It is readily conceded that confiscation of the box office receipts obtained by defendants who trafficked in smut in this case is a desirable solution and a desirable court decree, and is a method to deter the continued offensive conduct of defendants. However, what is desirable in this, and in many other situations, is not the equivalent of what is lawful or within the powers of this court or any other court to grant.

FOOTNOTES

[1] Among the laws of Ohio which are indicative are the following: See Sec. 2905.34, R.C., the pertinent parts of which are quoted below:

> "As used in sections 2903.13 to 2903.16, inclusive, and sections 2905.34 to 2905.39, inclusive, of the Revised Code:
>
> "(A) Any material or performance is 'obscene' if, when considered as a whole and judged with reference to ordinary adults, any of the following apply:
>
> "(1) Its dominant appeal is to prurient interest;
>
> "(2) Its dominant tendency is to arouse lust by displaying or depicting nudity, sexual excitement, or sexual conduct in a way which tends to represent human beings as mere objects of sexual appetite;
>
> "(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;
>
> "(4) It contains a series of displays or descriptions of nudity, sexual excitement, sexual conduct, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a

dominant tendency to appeal to prurient interest, when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than for a genuine scientific, educational, sociological, moral or artistic purpose. * * *

"(E) 'Material' means any book, pamphlet, ballad, printed paper, phonographic record or tape, motion picture film, print, picture, figure, image, description, or other tangible thing capable of being used to arouse interest through sight, sound, or in any other manner.

"(F) 'Performance' means any motion picture, preview, play, show, skit, dance, or other exhibition performed before an audience."

This statute was effective September 15, 1970, after the filing of the complaint, but before the decision in the lower court. The film was exhibited after the effective date, and the trial de novo was held after the effective date of the statute. Other statutes so considered are:

R.C. 2905.08—Adultery or fornication;
R.C. 2905.10—Inducing illicit intercourse;
R.C. 2905.26—Prostitution, lewdness and assignation defined;
R.C. 2905.30—Indecent exposure;
R.C. 2905.31—Nudism;
R.C. 2905.44—Sodomy.

APPENDIX H

Judgment Entry of the Court of Appeals of Lucas County, Ohio

(Filed August 18, 1971)

(Title omitted in printing)

This day this cause came on to be heard and was heard as a trial de novo on the appeal of defendants-appellants from a decision of the Court of Common Pleas of Lucas County, Ohio.

The court, being fully advised in the premises, finds that applying the tests set forth in *Roth v. United States*, 354 U.S. 476, 1 L. Ed. 2d 1498, 77 S. Ct. 1304 (1957) and a book named "John Cleland's Memoirs of a Woman of Pleasure," et al., Appellants, v. Attorney General of the Commonwealth of Mass., 383 U.S. 413, 16 L. Ed. 2d 1, 86 S. Ct. 975 (1966), the motion picture film "Without A Stitch" is obscene; that the public exhibiting of it is a nuisance under the applicable provisions of Chapter 3767, Ohio Revised Code; that said provisions are constitutional; that the defendants, and each and all persons acting for them, should be permanently enjoined from exhibiting said motion picture film; that the Westwood Art Theatre, where said motion picture film was exhibited should be closed for one year from the date hereof; that a tax of $300.00 should be imposed on the defendants and against the real property upon which said Westwood Art Theatre is located; that the defendants should account for the box office receipts arising out of the exhibiting of said motion picture film from the effective date of the Common Pleas Court order enjoining the presentation of said film, September 19, 1970, up to and including the final performance; and that said box office receipts should be paid to the Lucas County Treasurer.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the motion picture film "Without A Stitch" is obscene and that the public exhibiting of it is a nuisance

under the applicable provisions of Chapter 3767, Ohio Revised Code.

IT IS FURTHER ORDERED that the defendants, and each and all persons acting for them are permanently enjoined from exhibiting the motion picture film "Without A Stitch."

IT IS FURTHER ORDERED that the Westwood Art Theatre be closed for one year from the date of the filing hereof.

IT IS FURTHER ORDERED that a tax of $300.00 is imposed on the defendants and against the real property upon which said Westwood Art Theatre is located.

IT IS FURTHER ORDERED that the defendants and each of them forthwith account to this court for the box office receipts arising out of the exhibiting of the motion picture film entitled "Without A Stitch" from the effective date of the Court of Common Pleas order enjoining the presentation of the film, September 19, 1970, up to and including the final performance and that defendants thereupon pay said box office receipts to the Lucas County Treasurer.

IT IS FURTHER ORDERED that costs be assessed against the defendants.

To all of which defendants except.

APPENDIX I

Findings of Fact and Conclusions of Law of the Court of Common Pleas of Lucas County, Ohio

(Filed September 16, 1970)

(Title omitted in printing)

FINDINGS OF FACT

The Court on the evidence, the exhibits and on the motions of the parties makes the following findings of fact;

1. That the Plaintiff, Clark L. Ewing, is a resident of Lucas County, Ohio, and brought this action in the name of the State of Ohio, pursuant to Section 3767.01 et seq. of the Ohio Revised Code for the purpose of attempting to enjoin the exhibition of the motion picture film "Without a Stitch," which has been playing at the Defendant, Westwood Art Theatre, hereinafter called Defendant Theatre, since July 17, 1970. Said Defendant Theatre being located in Lucas County, Ohio. It is an attempt to abate the same as an alleged public nuisance in the City of Toledo, Lucas County, Ohio. That the first newspaper advertisement for said movie appeared July 17, 1970, in Toledo, Lucas County, Ohio (See Exhibit 1). The next day's advertisement was identical to Plaintiff's Exhibit 2, both advertisements being selected by the Defendant, James Westcott, Manager of the Defendant Theatre from a press book prepared by the Velde Company of New York City, from advertisements prepared by an advertising agency hired by the Defendant, Tonylyn Productions, Inc.

2. That the Defendant Art Theatre Guild, Inc., is a corporation organized under the laws of the State of Ohio and operates the Westwood Art Theatre at 1602 Sylvania Avenue, Toledo, Ohio. That said defendant, James Westcott, is the Manager and person in control of the operation of said Theatre, and it is a conventional closed indoor theatre.

3. That both the newspaper advertisements and the marquee of the Defendants Theatre from July 17, 1970, to

the date of the hearing herein, informed the public that the movie "Without a Stitch" is rated "X", a rating self-imposed by the Defendant Westcott. That the rating X is taken generally to mean that a movie is not acceptable for persons under the age of 18, and that they are not to be admitted. The only method for determining whether a prospective patron is under 18 is by their appearance and that there is no guarantee that the movie was not exhibited to juveniles, albeit unintentionally. The casual policing of possible juveniles brings this facet of the operation close to the strict prohibition against juvenile exposure.

4. That the Defendant Theatre is operated in leased premises by the Defendant Art Theatre Guild, Inc., an Ohio Corporation wholly owned by Louis K. Sher, a resident of Beverly Hills, California, with the main office of the Defendant Theatre Guild, Inc., in Scottsdale, Arizona.

5. That the Defendant Tonylyn Productions, Inc., is a Corporation organized under the laws of the State of California. That it owns distribution rights in and to the motion picture film "Without a Stitch," as a result of which it is now and has been deriving revenues from the exhibition of said motion picture film in the county. That a portion of the income received by the Defendant Theatre for showing said movie, is paid to the Defendant Tonylyn by Art Theatre Guild, Inc. Sherpix is a wholly owned subsidiary of the Defendant, Art Theatre Guild, Inc., and that Sherpix purchased from the Defendant Tonylyn the right to fifty percent (50%) of the proceeds received from the exhibitors of the movie, "Without a Stitch." Plaintiff Exhibit 4 is an accurate continuity with pictures (of low quality) of the subject movie, that said movie is in color, 96 minutes long, primarily in Danish with English subtitles. That said movie was viewed in its entirety by the Court.

6. The movie specifically showed a simulated sexual relation between a seventeen and one-half year old girl and a treating physician; an attempted act of sexual intercourse with a young man which was incomplete. That the

physician's sexual intercourse as well as suggested cunnilingus and oral sodomy was purported to be a therapeutic treatment. That through the media of a holiday trip with background travelogue type photographs, the sexual morals of the various countries were attempted to be shown through the means of various normal, abnormal, and unlawful sexual approaches. That these involved an act of anal copulation involving the subject girl and a male companion as well as vaginal copulation between the subject girl and another male; sadistic-masochistic, sexual relationships between this subject girl and an adult male companion; the display of a dildo to this girl; this girl nude with a nude male and another nude female with the subject girl's sexual parts over the males genitals and the other female's sexual parts over the male's face, and the girls kissing each other; that this subject girl was also induced to make and participate in the making of a pornographic movie. There was also a scene suggesting lesbian activity.

7. That in addition to the pornography there were a number of scenes involving total or partial nudity resulting in visual creation of scenes leading to acts of male-female copulation, cunnilingus, sodomy, fellatio, lesbian relations and other sex play with the inference that these were a benefit, therapeutically, to her alleged sexual frigidity.

8. That said movie depicted that this minor girl not only was induced to and did engage in any type of sexual relationships, but she progressed first from being reluctant to engaging in sexual relations, then to a point where she'd be seduced in several hours, and finally to a point where she could be seduced in a relatively few minutes.

9. That the foreplay conversation and imagery leading up to expressed and implied sexual activity, the activity itself, and the immediate aftermath thereof, occupied about 60 minutes of the 96 minutes of the running time of the movie. The Court finds that the dominant theme of the movie taken as a whole from the above descriptions was one dealing with "the initiation rites of a

minor girl to an allegedly mature sex life" with an overemphasis on arousing prurient sex interests.

10. That acceptability by a movie audience is not the true criteria of the measurement of community standards relating to the representation of sexual matters or acceptance of a movie by the community because the attending audience, as in this case, is a very small segment of the community. The proper criteria for a valuation of contemporary standards of the community relating to the representation of sexual matters must necessarily be the enacting and enforcement of laws by that community governing the conduct of citizenry; that simple reference to the Ohio Revised Code sets forth the legal moral standards of the people of Ohio, including Lucas County, on sex matters and that there is generally attempted enforcement in this community. These Sections include, but are not limited to the following:

Sec. 2905.08 O.R.C., Adultery or Fornication
Sec. 2905.10 O.R.C., Prostitution
Sec. 2905.30 O.R.C., Indecent Exposure
Sec. 2905.30 O.R.C., Solicitation of unnatural sex act
Sec. 2905.31 O.R.C., Nudism
Sec. 2905.44 O.R.C., Sodomy

There are existing similar statutes in the majority of states, giving an inference of national community standards.

11. That the depiction in the movie of the relationship between the alleged doctor, the minor girl, was unrealistic, unethical, and both as a course of conduct and as presented, was patently offensive.

12. That the movie "Without A Stitch" had either utterly no redeeming social value, as testified to by the Plaintiff and experts for both the Plaintiff and the Defendants, or on entertainment value and alleged story line so inane as to really be merely the vehicle and background for repeated simulated sexual acts of every nature, natural and unnatural, moral and immoral, lawful and unlawful.

13. That neither said motion picture nor the advertising and promotional materials which the defendants caused to be published in Lucas County, Ohio, "pandered" as said term is defined in *Ginzburg vs. United States*, 383 U.S. 463, 86 S. Ct. 942, 16 L. Ed. 2d 31.

14. That said film did not constitute an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. Said film is seen only by persons desiring to see it and paying an admission charge.

CONCLUSIONS OF LAW.

The court further makes the following conclusions of law:

1. That the definition of obscenity to be applied by this Court is that provided by the United States Supreme Court in *Roth vs. United States*, 354 U.S. (1957), which was in the following terms:

> "Whether to the average persons, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." (354 U.S. at 489)

as amplified by Mr. Justice Brennan in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure," et al. vs. Attorney General of the Commonwealth of Massachusetts*, 383 U.S. 413 (1966), where he said:

> "Under this definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value,"

and as further amplified by this latter statement in the same decision:

> "the circumstances of production, sale, and publicity are relevant in determining whether or not the publication and distribution of the book is constitutionally protected. Evidence that the book was commercially exploited for the sake of prurient appeal, to the exclusion of all other values, might justify the conclusion that the book was utterly without redeeming social importance."

2. That as defined by Judge Leis of the Court of Common Pleas of Hamilton County, Ohio, in his opinion in the *State of Ohio ex rel. Charles H. Keating, Jr. vs. A Motion Picture Film Entitled "Vixen" et al.*, Case No. A. 242722 in said county, a copy of which has been supplied to the court, a prurient interest in sex "is an interest which is lewd in thought and/or desire. It is an interest inclined to, or characterized by lascivious thought in that which is inclined to lust; it is thought that is wanton or lewd."

3. That based on the findings of fact above the dominant theme of the movie "Without a Stitch" taken as a whole appeals to a prurient interest in sex.

4. That, as found by Judge Celebrezze of the United States District Court for the Northern District of Ohio, Eastern Division, in his decision, in *Grove Press, Inc., et al. vs. Anthony B. Flask, et al.*, Case No. C69-735, a copy of which decision has been supplied to the court, "depiction of preparation for an engagement in coitus, fellatio, cunnilingus and suggested acts of sodomy are "patently offensive' when shown in the exhibition of a film open to the general public over 18 years of age."

5. That based upon the findings of fact above and the preceding conclusions of law the movie "Without a Stitch" is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matter.

6. That if the movie had any social redeeming value such value was so slight that the defendants' emphasis on the sexually provocative aspects of the movie merits this court's accepting their evaluation of the movie at face value and finding that the movie is utterly without redeeming social importance.

7. That the movie "Without a Stitch" is obscene and that it is not protected by the First and Fourteenth Amendments to the Constitution of the United States.

8. That the Ohio Nuisance Statutes relied on by plaintiff herein, as found by Judge Celebrezze in the previously cited decision, are constitutional and that plaintiff has stated a cause of action thereunder.

9. That this court is not bound by the findings of the United States District Court for the Central District of California in Case No. C 69-2041-AAH, *United States of America, Plaintiff v. Three Cartons, more or less, Motion Picture Film, 17,770 feet interpositive, 9,600 feet soundtrack, entitled "Without a Stitch" et al., Defendants and Tonylyn Productions, Inc. Claimant,* for several reasons, but primarily because it was a case decided under customs law and not on all the issues raised herein.

10. That the fact that said movie has been displayed in other cities either with and without prior successful prosecutions is not probative in this case.

11. The dominant theme of the material taken as a whole being found an appeal to prurient interest in sex, and the material being patently offensive because it affronts contemporary community standards relating to the descriptions or representations of sexual matters, and the material being utterly without any redeeming social value, the court finds that in this film these elements coalesce.

COURT ORDER

The Court, therefore, finds that the Plaintiff is entitled to an order permanently enjoining the Defendants, each and all of them and all persons acting by, through, under, or in concert with them, from exhibiting the motion picture film entitled "Without a Stitch" in the State of Ohio. And said permanent injunction is to issue and become effective three days from the date of the filing of this order unless the defendants jointly or any one of them, deposit an appeal bond in the amount of $20,000.00 to stay execution until final adjudication in the Appellate Courts of this State.

The question of forfeiture as prayed for in the petition is stayed, pending final adjudication.

That the Defendants are to pay the costs herein.

NICHOLAS J. WALINSKI, *Judge*

SUPREME COURT, U. S.

FILE
OCT 4
MICHAEL RODAK,

IN THE

Supreme Court of the United States

No. 73-1973

October Term, 1974

ART THEATER GUILD, INC., *et al.*,
Appellants,

vs.

STATE OF OHIO *ex rel.*, CLARK L. EWING,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

MOTION TO AFFIRM

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Supreme Court of the United States

No. 73-1973

October Term, 1974

ART THEATER GUILD, INC., *et al.*,
Appellants,

vs.

STATE OF OHIO *ex rel.*, CLARK L. EWING,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

MOTION TO AFFIRM

The Appellee, State of Ohio ex rel. Clark L. Ewing moves to affirm the judgment of the Supreme Court of Ohio pursuant to Rule 16(1)(c) of the United States Supreme Court.

That the public nuisance laws may be used to abate the public exhibition of an obscene motion picture film has already been decided by this Court in a series of obscenity cases on review from the state of Georgia. See Evans Theatre Corp. et al. v. Slaton, District Attorney of Fulton County, 227 Ga. 377, 180 S. E. 2d

712 at 716 (Mar. 4, 1971) wherein the Georgia Supreme Court upheld a civil injunctive action as to the film "I Am Curious (Yellow)" on "public nuisance" grounds. Cert. denied in Evans Theatre Corp. et al. v. Slaton, District Attorney of Georgia, 404 U.S. 950, 30 L. Ed. 2d 267, 92 S. Ct. 281 (Nov. 9, 1971). The Evans Theatre Corp., supra, abatement procedure was followed in Slaton v. Paris Adult Theatre I, 185 S. E. 2d 768 at 768 (Nov. 5, 1971) and approved by this Court in Paris Adult Theatre I v. Slaton, 413 U.S. 49, 37 L. Ed. 2d 446 at 455, 93 S. Ct. 2628 (June 21, 1973). See, also, Slaton v. Paris Adult Theatre I, 201 S. E. 2d 456 (Oct. 30, 1973), cert. denied in Paris Adult Theatre I v. Slaton, ___U. S. ___, 41 L. Ed. 2d 1173, ___S. Ct. ___ (July 25, 1974).

The views of this Court on the seizure of obscene materials as contraband and their forfeiture as such are clearly stated in U. S. v. Reidel, 402 U. S. 351, 28 L. Ed. 2d 813, 91 S. Ct. 1410 (May 3, 1971), U. S. v. Thirty Seven (37) Photographs, 402 U. S. 363, 28 L. Ed. 2d 822, 91 S. Ct. 1400 (May 3, 1971). See, also, Kingsley Book Inc. v. Brown, 354 U. S. 436, 441 l L. Ed. 2d 1469, 77 S. Ct. 1325 (June 24, 1957). The power to declare forfeitures as to the instrumentalities of the crime has been fully litigated

in a series of cases recently decided by this Court. U.S. v. U.S. Coin and Currency, 401 U.S. 715, 28 L.Ed.2d 434, 91 S.Ct. 1041 (Apr. 5, 1971), One Lot of Emerald Cut Stones and One Ring v. U.S., 409 U.S. 232, 34 L.Ed.2d 438, 92 S.Ct. 489 (Dec. 11, 1972), Astol Calero-Toledo v. Pearson Yacht Leasing Co., ___U.S. ___, 40 L.Ed.2d 452, ___S.Ct.___ (May 15, 1974).

Statement of the Case.

The film "Without A Stitch" opened at the Appellant Westwood Art Theater in Toledo, Lucas County, Ohio, on July 17, 1970.

Appellant Westwood Art Theater is operated by Appellant Art Theatre Guild, Inc., an Ohio Corporation, under a lease from the owner of the premises. Appellant Art Theatre Guild, Inc. (wholly owned by Louis K. Sher, a California resident) has a wholly owned subsidiary (Sherpix, Inc., an Ohio Corporation) which, in turn, owns the right to 50% of the proceeds received from the exhibitions of the film "Without A Stitch" in the State of Ohio and throughout the United States. Appellant Tonylyn Productions, Inc. owns the remainder of the rights for exhibitions in the United States (Jurisdictional Statement at page 52.)

On August 10, 1970, Appellee Clark Ewing, a private citizen residing in Lucas County, Ohio, brought this action in the Court of Common Pleas of Lucas County, Ohio, in the name of the State of Ohio, under the authority of Section 3767. 01, et seq., of the Ohio Revised Code, for the purpose of securing a temporary and permanent injunction to prevent the exhibition of the picture "Without A Stitch" in the State of Ohio, and for an accounting of the box office receipts, which he prayed be forfeited to the State of Ohio, all on the theory that the film constituted a public nuisance, as defined by O. R. C. Section 3767. 01, et seq.

Under Ohio precedure, the defendant in such matters has the option of consolidating the hearing on the temporary injunction with the trial on the merits for the final injunction. The hearing for a temporary injunction was consolidated with the hearing on the merits which came on for trial commencing on Aug. 25, 1970.

The film is in Danish with English subtitles and lasts 96 minutes. See Continuity for "Without A Stitch" at Appendix A and B to this Motion to Dismiss. The Westwood Art Theater followed the instructions of the distributor that no persons under 18 were to be admitted. The theater is a closed, or "hard top" theater, not a

drive-in.

The trial was conducted without a jury. The judge viewed the film. The appellee testified and also called as a witness Dr. Anders Otterland, a medical school professor, who testified that the dominant theme of the movie was to exhibit different forms of sexual deviation, variations, variances (Transcript, vol. IV, p. 84); that the film had no social value (p. 90); that the depiction of the doctor's role in the movie was utterly unrealistic (p. 94); and that the doctor in the movie was "comiting an ethical crime"(p. 94); that he "couldn't think of any doctor that would teach a young girl in his office to make sexual intercourse" and that it was "utterly unrealistic"(p. 96); that, based upon his experience as a doctor in the sex education bureau, the progression which the girl goes through and her reactions to them was not realistic (p. 96); that the film was not a true depiction of the nature of female sexuality (p. 97); and that such an incorrect description of female sexuality has a corruptive effect on society as a whole. (p. 97)

A continuity of the film "Without A Stitch", attached as Exhibit "C" to the complaint, was admitted into evidence as plaintiff's exhibit 4 (Transcript, vol. IV, p. 99). The continuity of the film "Without A Stitch" appears herein at Appendix "A".

Appellants called three witnesses, Dr.

Frank A. Hoffman, an alleged expert on erotic art and folklore; Louis M. Pesce, former New York state film censor, and presently advisor to the film industry; and Dr. Michael Greicus, an English professor.

On September 16, 1970, the Court of Common Pleas found the film to be obscene and filed 14 findings of fact and 11 conclusions of law (Jurisdictional Statement at pages A51-57.) The order entered by the trial court reads as follows (Jurisdictional Statement at page A58):

COURT ORDER

> The Court, therefore, finds that the Plaintiff is entitled to an order permanently enjoining the Defendants, each and all of them and all persons acting by, through, under, or in concert with them, from exhibiting the motion picture film entitled "Without A Stitch" in the State of Ohio. And said permanent injunction is to issue and become effective three days from the date of the filing of this order unless the defendants jointly or any one of them, deposit an appeal bond in the amount of $20,000.00 to stay execution until final adjudication in the Appellate Courts of this State.
>
> The question of forfeiture as prayed for in the petition is stayed, pending final adjudication.
>
> That the Defendants are to pay the costs herein.
>
> NICHOLAS J. WALINSKI, Judge

Appellants elected to continue exhibiting the film at the Westwood Art Theater and deposited an appeal bond in the amount of $20,000.00 to stay execution.

An appeal on law and fact was taken to the Lucas County Court of Appeals from the trial court's judgment. Under the now abandoned Ohio practice, such an appeal could be taken in certain classes of cases, and the appeals court heard the case de novo on the record below and on additional evidence. The only additional evidence heard went to establish the procedure for barring juveniles from the theater during the run of this picture.

The Court of Appeals made its own findings of fact and concluded, in its opinion (Jurisdictional Statement at pages 31-48) that the film was obscene and should be permanently enjoined from exhibition in the State of Ohio. In addition, the Court of Appeals held that all of the remedies contained in Chapter 3767 of the Revised Code were mandatory and accordingly ordered the theater closed for a year, assessed a Three Hundred ($300.00) Dollar tax and ordered an accounting of the box office receipts from the date of the final order of the Court of Common Pleas through the final performance. One of the three judges of the Court of Appeals concurred on the granting of the permanent injunction and the

other relief, but dissented from that part of the judgment which ordered an accounting of the box office receipts.

An appeal was then taken to the Ohio Supreme Court. That Court agreed to hear the case but limited its review to questions concerning the Ohio Nuisance Statute. The Ohio Supreme Court refused to review the question of the obscenity of the film.

On February 27, 1974, the Ohio Supreme Court announced its decision, reported at 37 Ohio St. 2d 95 sub. nom. State ex rel. Ewing v. Without A Stitch. In its decision, the Ohio Supreme Court modified the judgment of the Court of Appeals in that it permitted an accounting of net profits only from the time of the original injunction. It held that the statute did not permit forfeiture of box office receipts. It further held that although the theater could be closed for a year, the theater could remain open if the owner of the real estate proved to the satisfaction of the Court his good faith and complied with the release provisions of R. C. 3767. 04. In this regard, the Ohio Supreme Court stated (Jurisdictional Statement at page A11):

> "The fourth remedy is also contained in R. C. 3767. 06. One part of the statute dictates that the abatement order include an order closing the place, in and upon which the nuisance was maintained,

for a period of one year. R.C. 3767.06 states that the closing pertains to the use of the property "for any purpose." However, this harsh penalty is ameliorated by permitting the owner to obtain a release from the order by complying with the release provisions of R.C. 3767.04. Those provisions require that the closing order must be released if the owner appears in court, pays the costs incurred in the action, files a bond in the full value of the property, and demonstrates to the court that he will prevent the nuisance from being reestablished."

ARGUMENT.

I.

The Ohio Nuisance Statute (R.C. Section 3767.01 et seq.), as Applied by the Ohio Courts to the Trial Facts Herein, Is a Constitutionally Permissible Means of Controlling Obscenity.

In their attack on the Ohio Nuisance Statutory scheme, as interpreted by the highest court in the State of Ohio, Appellants list thirteen alleged defects of constitutional dimension, five of which were not considered by the Ohio Supreme Court in its opinion, and are unrelated to the facts on appeal herein. (See second, fifth, tenth, twelfth, and thirteenth grounds appearing at pages 8, 9, 11, and 12 of the Jurisdictional Statement.) Appellee submits that under rudimentary principles of constitutional law the latter five claims are not properly before this court. Appellants are limited in their attack on the constitutionality of the statute to the specific manner in which the statute was applied in this case. They cannot complain that in the future other sections may be unconstitutionally applied to others: See United States v. Raines, 364 U. S. 17, 21 (1960):

> "Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to

other persons or other situations in which its application might be unconstitutional."

The reasonableness of the above-limiting rule of constitutional law is evident when one considers Appellants' second alleged defect which reads as follows:

> Second, Section 3767.01 describes only obscene films as nuisances subject to the penalties of the statute, but not books, magazines or pictures of similar character or content. Such a classification is both an arbitrary denial of substantive due process and equal protection of the laws guaranteed by the Fourteenth Amendment. See Yick Wo v. Hopkins, 118 U.S. 356 (1886)."

The impropriety of considering the issue of arbitrary classification, based upon an assumption that "books, magazines or pictures of similar character or content" are not subject to the penalties of the statute, is apparent when one considers that said statute has already been given a contrary interpretation by the Ohio trial courts (that is, to subject such subject matter to the statute) and, less than five months ago, such interpretation was sustained by a three-judge federal district court in Cincinnati. See Cincinnati Properties Inc. et al. v. Simon Leis et al., Civil Action No. 8471, In the United States District Court for The Southern District of Ohio,

Western Division, decided May 2, 1974, a copy of which appears herein at Appendix "C".

A. FIRST ALLEGED DEFECT.

The first alleged defect, based upon overbreadth, is answered by the Ohio Supreme Court in its opinion below. See State ex rel. Ewing v. A Motion Picture Film Entitled "Without A Stitch" et al., 37 Ohio St. 2d 95, 307 N. E. 2d 911 at 914:

> "First, appellants allege that the definition of nuisance contained in R. C. 3767. 01(C) is overbroad. In essence, the statute states that any place which exhibits filmed obscenity is a nuisance, and this court has held that only activity which violates R. C. 2905. 34 and R. C. 2905. 35 constitutes a "nuisance" within the meaning of R. C. 3767. 01(C). State ex rel. Keating v. Vixen, supra, (27 Ohio St. 2d 278, 272 N. E. 2d. 137). Upon remand of the Vixen case from the United States Supreme Court, this court also held (35 Ohio St. 2d 215, 301 N. E. 2d 880) that the definition of obscene material contained in R. C. 2905. 34 comports with the constitutional definition of the word "obscenity" as enunciated in Miller v. California (1973), 413 U. S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419. Since an obscenity-nuisance abatement action under R. C. 3767. 01 et seq. is limited to the exhibition of obscene material as defined in R. C. 2905. 34, and since R. C. 2905. 34 is not overbroad, if follows that the definition of nuisance contained in R. C. 3767. 01(C) is not overbroad."

Appellant's claim of overbreadth is "old hat" to obscenity litigation involving obscenity statutes which employ "specificity". See the trial court's decision in Adams Newark Theatre Co. v. Newark, 120 A.2d 496 at 499 (Feb. 7, 1956) which upheld appellants' contention herein, but which, in turn, was unanimously reversed by the New Jersey Supreme Court in Adams Newark Theatre Co. v. Newark, 126 A.2d 340 with that Court remarking at page 343:

> "The municipality is thus faced with a constant dilemma. If it employs broad language, such as 'lewd, obscene or indecent,' the defense contends the accusation is so vague and general as not to apprise the defendants of the particular case to be met. While, if the information which would undoubtedly be demanded under those circumstances is put into the ordinance itself for clarification, it is said to become a trespass upon the constitutional protection of free speech."

It should be of particular interest to this Court that, on the same date that it upheld Roth-Alberts 354 U.S. 476, 1 L.Ed.2d 1498, 77 S.Ct. 1304 (June 24, 1957) the Roth-Alberts Court also affirmed the judgment of the New Jersey Supreme Court in a 5-3 per curiam opinion in Adams Newark Theatre Co. v. Newark, 354 U.S. 931, 1 L.Ed.2d 1533, 77 S.Ct. 1395 (June 24, 1957).

Appellants claim that language appearing

in R.C. Sections 2907.01(F)(2) and 2907.01(F)(5) is vague, namely "in a way which tends to represent human beings as mere objects of sexual appetite" and appeal to prurient interest "for its own sake" for "commercial exploitation" rather than for a "genuine . . . moral . . . purpose" must fail for the same reason.

B. THIRD ALLEGED DEFECT.

The third alleged defect (Jurisdictional Statement at page 8) which attacks the trial court's power, sitting as an Equity Court, to issue a temporary injunction upon a standard of proof "to the satisfaction of the court or judge" was not properly raised in the state court. See Whitney v. California, 274 U.S. 357, 362-363; Supreme Court Practice by Stern and Gressman, Fourth Edition at page 131. No mention was made of it in either the trial court, the Court of Appeal, or the Supreme Court of Ohio and that issue is not properly before the Court in this Appeal.

Appellants' assertion under their third claim that a temporary injunction can be issued under the statute "without hearing evidence" is contradicted by the plain language of the statute and the ruling of the Ohio Supreme Court. See State ex rel. Ewing v. "Without A Stitch", supra,

at page 914:

> "Under R. C. 3767. 01 et seq., the earliest point in time when the exhibition of a film may be enjoined is upon the granting of a temporary injunction. However, a temporary injunction can only be issued after a judicial hearing at which all the parties can present evidence on the allegation of obscenity. "(our emphasis)

The ex parte restraining order authorized by R. C. Section 3767. 04:

> "restraining the defendant and all other persons from removing or in any manner interfering with the personal property and contents of the place where such nuisance is alleged to exist until the decision of the court or judge granting or refusing such temporary injunction and until the further order of the court thereon . . . ."

is not an injunction against exhibition. Rather, it is an exercise of the subpoena power of the court. See Grove Press, Inc. v. Flask, 326 F. Supp. 574, at 579; Walter v. Slaton, 182 S. E. 2d 464, 467 (May 13, 1971); Go v. Peterson, 480 P. 2d 35, at 36 (Feb. 1, 1971); and U. S. v. Little Beaver Theatre, Inc., 324 F. Supp. 120, 121 (Jan. 15, 1971). In any event, such ex parte restraining order was not issued by the trial court below, and such matter is not properly before this Court. United States v. Raines, supra.

The assertion under the third claim (Jurisdictional Statement at page 8) that "serious issues of prior restraint and inhibition of distribution of protected materials are presented by the interlocutory powers given the trial court by this statute" are completely without merit. See U. S. v. 37 Photographs, 402 U. S. 363, 91 S. Ct. 1400, 28 L. Ed. 2d 822, at pages 830-833 (May 3, 1971), which authorizes actual prior restraints for a reasonable period of time in advance of a final determination of the obscenity issue by the trial court (not in issue here) in Federal Customs cases.

That the judicial restraint may be applied after an adversary hearing at the preliminary injunction stage does not raise any additional procedural issues for, as authorized by Civil Rule 65(B)(2), the Court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. The defendant in such matters has the option of consolidating the hearing on the temporary injunction with the trial on the merits for the final injunction, and such did occur in the trial court below: See Ohio ex rel. Ewing v. "Without A Stitch", supra, at page 914:

> "R. C. 3767. 04 provides for the filing and disposition of an application for a

> temporary injunction. The appellee did file such an application in this case. R.C. 3767.04 also requires that the application for a temporary injunction be heard within ten days of filing, and that all defendants be served with the complaint and notice of the time and place of hearing on the application for a temporary injunction at least five days before the hearing. In the present case, the application for a temporary injunction was filed on August 10, 1970, and a hearing was scheduled for August 19, 1970. However, on the hearing date the court continued the hearing until August 25, 1970, and consolidated that hearing with a hearing on the merits of issuing a permanent injunction."

The Ohio procedures are well within the boundaries set by this Court in U.S. v. 37 Photographs, supra. See Ohio ex rel. Ewing v. "Without A Stitch", supra, at page 914, where the Ohio Supreme Court noted:

> "R.C. 3767.05 provides that a nuisance abatement action "shall have precedence over all other cases except crimes, election contests, or injunctions." In this case, a three-day hearing, commencing August 25, 1970, was held. It resulted in the issuance of a permanent injunctive order on September 16, 1970. The application for the temporary injunction was dismissed.
>
> At this point, it should be noted that R.C. 3767.01 et seq., do not provide for or allow censorship of films prior to a judicial determination of obscenity. Therefore, the United States Supreme Court decisions, such as Freedman v. Maryland,

(1965), 380 U.S. 51, 85 S.Ct. 734, 13 L. Ed.2d 649, and Teitel Film Corp. v. Cusack (1968), 390 U.S. 139, 88 S.Ct. 754, 19 L.Ed.2d 966, which specify the constitutional requirements of such a system, are not applicable."

C. FOURTH ALLEGED DEFECT.

The fourth alleged defect (Jurisdictional Statement at page 8) which suggests that, under the statute, an owner of the premises may be penalized "without proof of his guilty knowledge" and that there is a "shifting of the burden of proof of scienter" from the complaining party to the real estate owner is contradicted by the opinion of the Ohio Supreme Court. See Ohio ex rel. Ewing v. "Without A Stitch" at page 916; where the court stated that no individual could be penalized under the statute unless it was shown that such person had knowledge of the content of the film declared to be obscene:

> "The exhibition of films is an activity normally protected by the First and Fourteenth Amendments. Kingsley International Picture Corp. v. Regents (1959), 360 U.S. 684, 79 S.Ct. 1362, 3 L.Ed.2d 1512. R.C. 3767.01 et seq. penalize persons engaged in the exhibition of obscene films in that R.C. 3767.06 requires that all personal property used in conducting the nuisance be sold and R.C. 3767.08 imposes a tax of three hundred dollars upon persons maintaining the nuisance and upon the theater and the real property on which

it is located. Therefore, those penalty provisions can be imposed only if the persons upon whom they are sought to be imposed had knowledge of the content of the film declared to be obscene.

This requirement of scienter is not novel. In State ex rel. Keating v. Vixen, supra (27 Ohio St. 2d 278, 285, 272 N.E. 2d 137), this court held that a film constitutes a nuisance which can be enjoined pursuant to R.C. 3767.01 et seq. only if scenes in the film violate R.C. 2905.34 and 2905.35. R.C. 2905.35 expressly requires knowledge of the contents of the film on the part of any person against whom that statute is sought to be invoked. Therefore, no individual can be penalized under R.C. 3767.01 et seq. for maintaining a theater in which an obscene film is exhibited unless it is shown that that person knew of the contents of the film. In the present case, none of the appellants contended upon appeal that he did not have knowledge of the contents of the film." (our emphasis.)

Further, the opinion of the Ohio Supreme Court made it clear that the burden of proof under the obscenity-nuisance abatement action is on the complaint. See Ohio ex rel. Ewing v. "Without A Stitch", supra, at page 916:

"Appellants' third reason for asserting that R.C. 3767.01 et seq. are unconstitutional is the allegation that those statutes place the burden of proving that a film is not obscene upon the exhibitor. It is settled that in areas generally protected by the First Amendment, the state must shoulder the burden of proving that

the particular activity complained of is outside the scope of constitutional protection. Freedman v. Maryland, supra, (380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649); Speiser v. Randall (1958), 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460. However, R.C. 3767.01 et seq. do not place the burden of proof upon the defendants in an obscenity-nuisance abatement action. Since the statutes are silent on this point, the general rule, that the burden of proof is on the complainant, is applicable."

D. SIXTH ALLEGED DEFECT.

The sixth alleged defect pertains to R.C. section 3767.06 and the procedures which govern the final hearing on the merits. Appellants note that such procedures are the same as those employed at the hearing on the temporary injunction, and that the sixth claim is a duplication of other claims previously described.

E. SEVENTH ALLEGED DEFECT

Appellants' seventh alleged defect reading:

". . . the closing of a theater for a year prevents it, during that period, from exhibiting any film, whether or not sexually oriented, whether or not protected by the First Amendment and whether or not previously adjudged to be obscene in a court of law. That such a result, after the adjudication of obscenity of one film, under the questionable standards and procedures provided by this statute, raises implications. of prior restraint of the most serious kind."

is the same argument which was successfully urged upon the three-judge federal district court in Pursue Ltd. v. Huffman et al., as to which jurisdiction was noted by this Court in Huffman et al. v. Pursue Ltd., No. 73-296, ___U. S. ___, 39 L. Ed. 2d 870, ___S. Ct. ___ (Mar. 18, 1974). In that case, the federal district court enjoined the enforcement of a Lima, Ohio Common Pleas Court judgment which had padlocked a theater based upon a course of conduct involving the exhibition of 16 obscene motion picture films over a period of several months. Appellants herein filed a copy of said opinion of the three-judge federal district court in Pursue Ltd. v. Huffman et al., supra, with the Ohio Supreme Court, well in advance of its decision herein. In holding as it did in this case, the Ohio Supreme Court must be understood to have rejected the reasoning upon which the Pursue Ltd. decision was based.

Two months after the decision of the Ohio Supreme Court herein, the United States District Court for the Southern District of Ohio, Western Division, handed down an opinion wherein it considered the same issue, applied a different analysis, and came to a conclusion different from that of the three-judge federal district court in Pursue Ltd. v. Huffman, supra.

In Cincinnati Properties Inc. v. Simon Leis, (See copy of opinion at Appendix "C" at pages C-8 to C-11) the three-judge court (Peck, Porter, and Hogan) stated:

> "The plaintiffs' constitutional argument is this: A person is operating a book store containing a thousand different items each concededly presumptively protected by the First Amendment - a fair sampling of the 1,000 produces 50 which are subsequently the subject of an adversary judicial proceeding and found to be obscene. Any state remedy applied to the facts which prevents the operator from staying in business at that location and selling the other non-judicially examined materials is a prior restraint on the sale of those materials and therefore violates the First Amendment. We do not agree. The argument overlooks the right of the State, within constitutional bounds, to declare or define public nuisances and abate them. . . . The falacy of the plaintiffs' position is somewhat indicated by this simple example: A person possessing for sale one copy of one book concededly obscene and ten copies of a concededly non-obscene book is imprisoned for the former - during the term of imprisonment he is effectively stopped from dealing in non-obscene materials. Surely it would not follow that the imprisonment was unconstitutional because it was a prior restraint respecting the innocent materials.
>
> "From time immemorial states have chosen, in the exercise of their police power, to define certain action as illegal and, in addition, to define the place where certain prohibited activity is carried on as a

"nuisance". The attendant remedy provided in such nuisance cases has been one against the place in which the activity has been carried on. This record is clear that the business of selling books and materials and offering shows was being carried on in the involved locations (see, for instance, the hundreds of publications contained in the "Inventory" involved in No. 8714 (copy of the state court record attached to defendant Conroy's motion for summary judgment.)) No one questions that the sampling was a fair one and that sampling produced what is 100%, on this record, illegal and unprotected obscenity.

"The State of Ohio has seen fit to define as a nuisance, subject to abatement, a place in which obscenity is conducted. There being no question of fact that a business of obscenity was carried on, the question in this case is, therefore, really whether the State may validly define the operation in the place as a nuisance and close it for a year - padlock it - on that basis. If it can, there is no prior restraint of the non-judicially-viewed material, except purely incidental . . . .

"The constitutional power of the State to abate what has been appropriately defined as a public "nuisance" has never been seriously questioned. "Padlock" remedies have been consistently provided for by most states in the areas of prostitution, gambling, and liquor violations. It is not for us to conclude that one or the other of these subjects vis-a-vis the State's padlock power should be classed differently than obscenity. Each is a proper object of the police power and not unrelated . . . .

"Mugler v. Kansas, 123 U.S. 623 (1887) involved Kansas' first prohibition laws and, among others, a section providing, 'All places where intoxicating liquors are . . . . sold . . . . are declared to be common nuisances and upon the judgment of any court . . . . finding such place to be a nuisance under this section, the sheriff . . . . shall be directed to shut up and abate such place . . . . ' The place involved had been the subject of liquor sales. The Court, in upholding the constitutionality, said:

> 'The State, having authority to prohibit the . . . . sale of intoxicating liquors. . . . we do not doubt her power to declare any place kept and maintained for the illegal manufacture and sale of such, shall be deemed a common nuisance and to be abated, and, at the same time, to provide for the indictment and trial of the offender. One is a proceeding against the property used for forbidden purposes . . . The statute does not put the brand of a common nuisance upon any place, unless . . . . that place is kept and maintained for purposes declared by the legislature to be injurious to the community.' (Underscoring ours.)

"The padlocking provision of the Ohio statute is a time honored remedy involving the place - it is not censorship or prior restraint."

F. EIGHTH ALLEGED DEFECT.

Appellants' eighth claim notes that, while the option of the owner of the premises under

R. C. section 3767. 06 may ameliorate the harshness of the penalty of closure as to him, "it does nothing to save the tenant in possession or operator of the theater, neither of whom have any such correlative statutory right. . . ." While that is true, the theater operator is not without his own option under the terms of the statute.

R. C. section 3767. 04 provides an exhibitor with the simple defense of confession and avoidance. Under section 3767. 04 the trial judge is required to issue the temporary injunction "If upon hearing the allegations of the petition are sustained to the satisfaction of the court or judge." The trial judge, however, is not mandated to padlock the premises if the "person owning, in control, or in charge of the nuisance so enjoined . . . shows to the satisfaction of the court or judge that the nuisance complained of is abated." Where, for example, the public nuisance was found to exist solely on the basis of one film and such showing was not representative of the course of conduct normally experienced, then it may be unreasonable to hold that a public nuisance exists if, at the time of the trial judge's finding and the preliminary injunction, the film is not showing as the result of having been "pulled" by a responsible exhibitor. See Brief for Appellants in Huffman et al. v.

Pursue Ltd., No. 73-296 at pp. 84-89.

There is no reason for this Court to believe that a good faith execution of that option on the part of the theater operator will not be recognized by an Ohio Equity Court. That matter, however, is not before the Court on this appeal, inasmuch as the Appellant theater operator did not exercise its option and, instead, elected to continue maintaining the nuisance (showing the film) notwithstanding the adverse decision by the trial court.

Appellants' further claim in their Jurisdictional Statement at pages 10-11 that "neither does it alleviate the problem of compelling the owner to come forward and disprove affirmatively what the complainant was never required to prove under the statute to obtain the closing order in the first instance." is answered herein at page 20 wherein Appellee replies to a similar contention made under the Fourth Alleged Defect. The burden of proof is on the complainant.

G. NINTH ALLEGED DEFECT.

A fair reading of the Ohio Supreme Court opinion in Ohio ex rel. Ewing v. "Without A Stitch", supra, at page 916 does not support Appellants' claim that the Supreme Court did not construe the nuisance statute to avoid overbreadth"

(which, it is claimed, would result if both private possession and public dissemination of obscene materials were included within the ambit of the statute). At the very least, the Ohio Supreme Court's statement reading: "Therefore, Stanley v. Georgia is not applicable to the exhibition of obscenity by a theater open to the public" recognizes that governmental sanctions against the private possession of obscenity is forbidden. Such statement is susceptible to one of two interpretations: either 1) that Stanley v. Georgia is not applicable because private possession is not within the ambit of the statute, or 2) that Stanley v. Georgia is not in point because the case on appeal (i.e. the statute as applied) deals with public exhibitions, and the "consenting adult" theory did not bring the matter within the exception as to private possession.

Further, in framing the above issue for the consideration of the Ohio Supreme Court below, Appellants did not raise the question properly. Whitney v. California, 274 U.S. 357, 71 L.Ed.1045, 47 S.Ct. 641. The issue was not stated as being one of "overbreadth". See Brief for Appellants in State of Ohio ex rel. Ewing v. "Without A Stitch", In the Supreme Court of Ohio, No. 71-649, at page 20. The question which was raised by Appellants in the Ohio

Supreme Court pertained to the "consenting adults" argument which, as noted by the Ohio Supreme Court opinion, was rejected in Paris Adult Theatre I v. Slaton, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446.

H. ELEVENTH ALLEGED DEFECT.

Appellants' claim that the statutory scheme "provides no procedural assurance of an immediate hearing after either temporary or permanent restraint, no assurance of an immediate judicial decision thereafter, and no assurance of a speedy and accelerated judicial review" is answered herein, in part, at page 17, wherein Appellee replied to a related argument made under the Third Alleged Defect.

By way of further reply, Appellee submits that the right of a state court system to impose a judicial restraint by way of preliminary injunction after a hearing on the merits, is no longer a debatable issue. The constitutional requirement for a "prompt final judicial decision" referred to by this Court in administrative prior restraint cases such as, Marcus v. Search Warrants, 367 U.S. 717, 6 L.Ed.2d 1127, 81 S.Ct. 1708 (June 19, 1961); A Quantity of Books v. Kansas, 378 U.S. 205, 84 S.Ct. 1723, 12 L.Ed.2d 809 (June 22, 1964); Freedman v. Maryland,

380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (Mar. 1, 1965); and Teitel Film Corp. v. Cusack, 390 U.S. 139, 19 L.Ed.2d 966, 88 S.Ct. 754 (Jan. 29, 1968), had reference to a speedy determination by a trial court as distinguished from a prior restraint applied in administrative proceedings.

If the language and reference of this Court in Teitel Film to "prompt final judicial decision by the trial court" was not clear (at page 969):

> ". . . the Chicago censorship procedures violate these standards in two respects. . . (2) the absence of any provision for a prompt judicial decision by the trial court violates the standard that . . . the procedure must also assure a prompt final judicial decision . . . ."(Our emphasis.)

that issue was laid to rest in Interstate Circuit Inc., v. Dallas, 390 U.S. 676, 20 L.Ed.2d 225, at 235, fn.22, 88 S.Ct. 1298 (1968).

The Interstate Circuit decision, supra, gives a crystal clear understanding of what this Court meant in Freedman by "prompt, final judicial decision." This Court has not made an issue out of the time period which is expended in carrying out the appellate review. That was one of the issues in the Interstate Circuit case. In Interstate Circuit v. Dallas (No. 56), 390 U.S. 676, one of the questions presented in the

jurisdictional statement was:

> "1. Whether Dallas City Ordinance 11284 is unconstitutional because it does not guarantee a prompt, final judicial decision to review actions of the Dallas Motion Picture Classification Board in classifying a motion picture as 'not suitable for young persons'?" (See Brief of Appellant, Interstate Circuit, Inc., at page 3.)

In Interstate Circuit's brief on this question, (See Brief for Appellant at pp. 3, 20, and 21), the following argument was presented at page 20:

> "Applying Freedman to the Texas judicial system, Interstate believes it is absolutely necessary that the Texas Supreme Court see the picture in dispute in order to provide for a prompt, final judicial determination that the action of the censor is correct. That court must face its judicial duty to uphold constitutional guarantees.
>
> "Since Ordinance 11284 could only secure the rights of Interstate and others by the City's promise of 'best effort,' it appears that this is not enough. Lacking the power to provide for a system of prompt judicial review, the City of Dallas could only give a system of review that required 247 days for a final decision.
>
> "This case is a perfect demonstration of the importance of the requirements of the Freedman case, as set out on page 59:
>
> > 'Therefore, the procedure must also assure a prompt, final judicial decision to minimize the

> deterrent effect of an interim and possibly erroneous denial of a license.'
>
> "Neither Texas statutes nor decisions of its appellate courts assures a prompt, final judicial decision. Judge Hughes' opinion on the first ordinance is still correct. There is no provision in the Texas statutes for prompt, judicial review in the trial and appellate courts, and experience shows that the risk of delay is built into the Texas procedure. The Texas Judicial System does not assure procedural safeguards that satisfy the requirements of Freedman . . . ."

It was in the framework of such arguments that this Court gave its reply in Interstate Circuit, supra, at page 235, fn. 22:

> "22. Appellants also assert that the city ordinance violates the teachings of Freedman v. Maryland, supra, because it does not secure prompt state appellate review. The assurance of a 'prompt final judicial decision' (380 U.S. at 59, 13 L. Ed. 2d at 655) is made here, we think, by the guarantee of a speedy determination in the trial court (in this case nine days after the Board's classification). See Teitel Film Corp. v. Cusack, 390 U.S. 139, 19 L. Ed. 2d 966, 88 S. Ct. 754 . . . ." (Our emphasis.)

II.

The Film "Without A Stitch" Is Not Protected by the First and Fourteenth Amendments.

Appellants' claim, that the film "Without

A Stitch" is constitutionally protected expression and may not be abated, affords an opportunity to this Court to examine the background history of an "obscenity vel non" determination which has broad dimentions:

1. In granting the motion to certify the appeal, the Ohio Supreme Court refused to consider Propositions of Law 3, 4, and 5 of the Memorandum In Support of Jurisdiction, which sought to draw in issue the ruling as to the obscenity of the film. In support of that refusal, it should be noted that both the trial court and the Court of Appeals of Lucas County had reviewed the film, both as to law and fact, and in the light of constitutionally valid tests. See the separate opinion of Justice White in J-R Distributors Inc. et al. v. Washington, ___ U. S. ___, 41 L. Ed. 2d 1166, ___ S. Ct. ___, July 25, 1974.

2. Further, the Memorandum in Support of Jurisdiction on the obscenity vel non issue failed to point out any "serious social value" which would require an Appellate Court to undertake an independent review of the issue of "redeeming social value." Neither does the Jurisdictional Statement on file with this Court provide such a missing link. See Court v. Wisconsin, 217 N. W. 2d 676 at 678, 679 (May 8, 1974).

3. The Court of Appeals' judgment on the obscenity vel non" issue, as to which Appellants seek review, applied two separate standards of review. The first standard applied the no-clear majority tri-partite test expressed in A Book Named

John Cleland's "Memoirs of A Woman of Pleasure", 383 U. S. 413, 86 S. Ct. 975, 16 L. Ed. 2d 1, which was adopted into Ohio law in Ohio v. Mazes. See State ex rel. Ewing v. "Without A Stitch", supra, at page 657. The second test applied the specific legislative standards set by the Ohio State legislature in R. C. section 2905. 34 which qualifies under this Court's recent pronouncements in Miller v. California, et al., 413 U. S. 15, 37 L. Ed. 2d 419, 93 S. Ct. 207 (June 21, 1973). See State ex rel. Ewing v. "Without A Stitch", supra, at pages 658-659.

Appellants' claim draws in focus the following additional questions as to the scope of this Court's review on the "obscenity vel non" issue: (1) Should this Court, or any other appellate Court, in reviewing an "obscenity vel non" finding, limit its review to the legal question of "redeeming social value" as held by the Wisconsin Supreme Court in Court v. Wisconsin, supra; and, if so, is it the Appellants burden to point out in the jurisdictional statement any "serious social value" which would require such an independent review? (2) Where the record on file on the "obscenity vel non" issue (Exhibit "C" to the Complaint and Plaintiffs' exhibit 4*) makes it sufficiently clear that the subject matter falls within the category of hard-core pornography, is plenary review by this Court necessary? See Justice White's opinion

*See Statement of Facts, supra, at page 5 and Appendix "A", herein.

in J-R Distributors Inc. et al. v. Washington, ___U. S. ___, 41 L. Ed. 2d 1166, ___S. Ct. ___(July 25, 1974).

A. IN A NUISANCE ABATEMENT ACTION PLENARY REVIEW OF THE "OBSCENITY VEL NON" ISSUE IS NOT REQUIRED WHERE THE SUBJECT MATTER ON ITS FACE SHOWS IT TO FALL WITHIN THE CATEGORY OF HARD-CORE PORNOGRAPHY.

The nuisance abatement action being reviewed involves no criminal sanctions for past conduct with associated vexatious questions such as "notice","scienter", "specificity", "vagueness", and the like. The limited question is what may a community do prospectively in aid of its public policy to proscribe the explicit displays of sexual conduct in public. It would appear that, under at least this limiting circumstance of an abatement action, the entire Court should be willing to agree on the rule of law expressed by Justice White in J-R Distributors Inc. et al. v. Washington, supra, at page 1167:

> "Finally, I join in denying petitions for certiorari in three other cases, Buckley v. State of New York, ___U. S. ___, 41 L. Ed. 2d 1175, 94 S. Ct. ___, Sians v. United States, ___U. S. ___, 41 L. Ed. 2d 1164, 94 S. Ct. ___, and J-R Distributors, Inc., et al. v. State of Washington, ___U. S. ___, 41 L. Ed. 2d 1166, 94 S. Ct. ___. In Buckley, the materials in question have been lodged with the Court, and the issue of their

obscenity is raised in the petition for certiorari. They were examined and described by the Court of Appeals for the State of New York and were held to be obscene under both Miller and pre-Miller standards. Examination of the materials has not persuaded me that certiorari should be granted. The same is true of Sians v. United States, ___ U. S. ___, 41 L. Ed. 2d 1164, 94 S. Ct. ___. The materials, an unremitting series of explicit photographs of a wide spectrum of sexual conduct, including homosexual acts, anal intercourse, fellatio, cunnilingus and group orgies, were held obscene under any standard by the Court of Appeals. I would not review that judgment.

"In J-R Distributors, Inc., the case in which this opinion is filed, the issue of the obscenity of the materials involved was raised in the petition for certiorari, and part, but not all, of them was lodged with this Court. I join in denying the petition for certiorari. Although some of the materials have not been filed here and are therefore not before us, the Washington Supreme Court found all of them obscene under both Roth and Miller standards. As for the materials on file, it is sufficiently clear to me that they fall within the category of hardcore pornography unprotected by the First Amendment that plenary review is not required. One of the publications involved is "Sex Between Humans and Animals." Mr. Justice Brennan would apparently hold that the First Amendment prohibits government from denying consenting adults access to such material, but I do not construe the First Amendment as preventing the States from prohibiting the distribution of a publication whose dominant theme is represented by repeated

photographs of men and women performing sex acts with a variety of animals." (Our emphasis.)

1. **"Without A Stitch" Is Hard-Core Pornography.**

Exhibit 4 in evidence as a part of the record below (also Exhibit "C" to the Complaint) is reproduced herein as Appendix "A" to this Motion To Dismiss. A casual perusal of the pictorial content and dialogue, and the further pictorial analysis thereof, appearing at Appendix "B" herein, establishes the hard-core pornographic nature of the film in question.* The succinct comments of the Court of Appeals of Lucas County are particularly helpful in arriving at the film's identity as "hard-core." See State ex rel. Ewing v. "Without A Stitch", supra, at page 658:

> "By any test, medium-core, hard-core, as if res ipsa loquitur, obscenity per se, patently obscene, or screaming obscenity, the film was obscene. See State ex rel. Sensenbrenner v. Adult Bookstore (1971), 26 Ohio App. 2d 183, 271 N. E. 2d 13; Jacobellis v. Ohio (1964), 378 U. S. 184, 12 L. Ed. 2d 793, 84 S. Ct. 1676; United States v. Klaw (C. C. A. 2, 1965), 350 F. 2d 155; Morris v. United States (D. C. App. 1969), 259 A. 2d 337; Womack v. United States (1961), 294 F. 2d 204, 111 U. S. App. D. C. 8; Dunn v. Maryland State Board of Censors (Md. 1965), 240 Md. 249, 213 A. 2d 751.
>
> "Briefly, we state that the so-called 'plot' is as follows. The principal participant is an unmarried, seventeen and a half year

*Even M.P.A.A. President Jack Valenti identified the film "Without A Stitch" as being a 'quasi-porno film playing in first-class houses." See Variety News article dated Jan. 28, 1970, appearing herein at Appendix D.

old girl about to be a senior in high school. She finds that when confronted with intimate relations with a male classmate she is frigid. To overcome what she concludes as an unusual attitude, she visits a doctor. The doctor proceeds to effect a cure, which includes a variety of sexual stimulations, including intercourse. Without his white coat and when the doctor was in the nude giving therapeutic treatment his numerous tatoos gave one the impression that his internship was taken with the Danish merchant marine. After treatment, the young girl started on a hitchhiking tour of Europe to further effect her cure. Defendants argue that the scenery and photography was very good and this gives to the picture some redeeming social value. The photography is good and the scenery is interesting, but this is not a travelogue, and when the sun slowly sets in the west, it ushers in another night of sexual excess and aberration. The included nude scenes of vaginal and anal copulation, lesbian relations, participation in a "stag" film, fellatio, cunnilingus, and sex orgies between two women and a male, and two males and the "star" of the production, the display of a dildo, sadism and masochism. All acts were simulated except the fondling and suckling of the patient's breast by the doctor. It is obvious that the presentation was to appeal to titillation, not to travel.

"As cured, the patient returns to her doctor to exhibit her new found radiant health and peace of mind. We find no redeeming social value in this film. If there is a plot, it was only a facade or pretext to exhibit what for years has been known as a "stag" film."

B. WHERE AN "OBSCENITY VEL NON" FINDING IS ARRIVED AT BY A TRIAL COURT'S APPLICATION OF THE TRI-PARTITE "MEMOIRS" TEST, ONLY THE "REDEEMING SOCIAL VALUE" ELEMENT IS THE SUBJECT OF APPELLATE REVIEW.

The tri-partite "Memoirs" test is a part of Ohio law, having been encorporated therein by the decision of the Ohio Supreme Court in State v. Mazes, 7 Ohio St. 2d 136 at 137, 218 N. E. 2d 725. That test was employed by the Court of Appeals of Lucas County in ruling as a matter of fact and law that the film "Without A Stitch" was obscene. See "Syllabus by the Court" in State ex rel. Ewing v. "Without A Stitch", supra, at page 655. (Under Ohio law, the syllabus of the Supreme Court, rather than the opinions, state the law. 21 Corpus Juris Secundum, §224 Syllabi at page 416, footnote 58.) It is now clear that the "Memoirs" test, which was applied by the Ohio Court of Appeals, is constitutional. Hamling v. United States, ___U. S. ___, 41 L. Ed. 2d 590 at 620, ___S. Ct. ___(June 24, 1974.)

Upon review of the findings of a trial court on law and fact under the "Memoirs" test, the only constitutional question for an appellate court should be whether the "quality" of the work is sufficient to require protection. That question - serious social expression vel non - is controlling and the only factor which the court must

independently review in light of the state's proscription of material which treats "sex in a fundamentally offensive manner, under rationally established criteria for judging such material." See Court v. Wisconsin, 217 N.W.2d 676 at 678, 679 (May 8, 1974). Compare Jenkins v. Georgia, ___U.S.___, 41 L.Ed.2d 642 at 650, 94 S.Ct.___ (June 24, 1974.) See also Reply Brief of Amicus Curiae C.D.L. in Ralph Ginzburg et al. v. U.S., No. 42, October Term 1965, at pages 6-7.

There is an overriding reason why the rule in Court v. Wisconsin, supra, and not that of Jenkins v. Georgia, supra, should be followed herein. "Patent offensiveness", having been legislatively determined, the case no longer remained within the Jenkins v. Georgia rule. At the time that the Court of Appeals of Lucas County made its findings of fact and law, R.C. section 2905.34 (employing "specificity") was in effect and was applied by the Court of Appeals in reaching its decision. See State ex rel. Ewing v. "Without A Stitch", supra, at page 659:

> ". . .We have also considered as indicative but not conclusive of national standards the laws of the State of Ohio (R.C. section 2905.34) and other states."

As noted by the Court of Appeals at footnote 1 on page 659:

> "This statute was effective September 15, 1970, after the filing of the complaint, but before the decision in the lower court. The film was exhibited after the effective date, and the trial de novo was held after the effective date of the statute. Other statutes so considered are . . . ."

It is not difficult to recognize the equivalent of the specificity requirement voiced by this Court in Miller v. California, supra, at page 431, in R. C. section 2905. 34(A)(4):

> "(4) It contains a series of displays or descriptions of nudity, sexual excitement, sexual conduct, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient interest when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than for a genuine, scientific, educational, sociological, moral, or artistic purpose . . . ."

This case, therefore, presents an appeal in which, as noted by Justice White in J-R Distributors Inc. et al. v. Washington, supra, (See page 36 herein) the state court has found the subject film to be obscene under both Miller (specific legislative standards) and pre-Miller standards. In Miller, supra, this Court said at page 431:

> ". . . If a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values

> applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary . . . "(Our emphasis.)

In this case, the necessity has not been demonstrated. Before this Court should be willing to undertake an independent review on such a record, it should require the Appellants to delineate in the Jurisdictional Statement the serious social value which allegedly hangs in the balance, or, alternatively, suffer the summary treatment on review described in Justice White's opinion in J-R Distributors Inc.

CONCLUSION

The finding of the Court of Appeals of Lucas County that the film "Without A Stitch" is hard-core pornography and "obscene" under the "Memoirs" test as refined by Miller, and the judgment of the Supreme Court of Ohio upholding the constitutionality of the Ohio Nuisance Statute, R. C. section 3767. 01 et seq. should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this day of September, 1974, copies of the within Motion to Affirm were airmailed, postage prepaid, to the below-listed parties to the proceedings. I further certify that all parties required to be served have been served.

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Attorney for Appellee

CONTINUITY FOR "WITHOUT A STITCH"

Playing Time: 96 Minutes

CAST:

Lilian
Dr. Petersen
Brita
Henry
Göran
Lise
Kurt
Freddy
Several Unidentified Males

SCENE 1 (0:00)
INTRODUCTION TO DENMARK

Background music plays to opening scenes of Danish landscape (rooftops - tower - statues of men on horseback - buildings - large modern structure - village scene). /1-1 thru 1-6/

SCENE 2 (0:45)
LILIAN RETURNS TO DR. PETERSEN'S
OFFICE AFTER EUROPEAN TRIP

Camera pans on building with sign, "A. Petersen" outside /2-1/ and moves inside. Dr. Petersen greets Lilian.

Dr. Petersen: "Welcome back, Lilian."

Lilian: "Thank you, doctor." /2-2/

Dr. Petersen: "Did you have a nice trip?" /2-3/

Lilian: "Oh, yes." (1:00)

Dr. Petersen: "Yes, you seem to have understood my theory. /2-4/ There are no specific sex morals /2-5/ Only those which apply to life in general /2-6/ - compassion, honesty and consideration. /2-7/ I think you have had personal experiences. /2-8/"

Lilian (hands him a book): "Here you are, just read." /2-9/

Dr. Petersen: "What a change!" /2-10/

SCENE 3 (1:45)
CREDITS

Lilian and her friend, Brita, walk to their bicycles and cycle together on the streets as the credits flash on the screen with theme music playing in the background. /3-1 thru 3-12/

SCENE 4 (3:10)
FLASHBACK. LILIAN VISITS DR. PETERSEN'S OFFICE FOR FIRST TIME

Flashback. Lilian and Brita approach Dr. Petersen's office.

Lilian: "Is that him? Couldn't it wait until tomorrow?"

Brita: "No, I've made an appointment." 4-1

Lilian: "You'll wait for me?"

SCENE 5 (3:30)
LILIAN'S FIRST EXAMINATION BY DR. PETERSEN

Inside Dr. Petersen's office.

Dr. Petersen: "Good day."

Lilian: "Good day."

Dr. Petersen: "You are Lilian, aren't you?" 5-1

Lilian: "Yes."

Dr. Petersen: "And you are 17 and one-half?" 5-2

Lilian: "Yes."

Dr. Petersen: "And you are a senior?" 5-3

Lilian: "Yes."

Dr. Petersen: "Then you'll finish high school next summer?" 5-4

Lilian: "Yes."

Dr. Petersen: "You have heard about contraceptives?" 5-5

Lilian: "Yes." (4:00)

Dr. Petersen: "Please take off your clothes. Your friend Brita told me what it is about. 5-6 You believe that you're frigid. First, a quite ordinary examination. Take off all your clothes, please." 5-7

She unzips her slacks and hesitates.

Dr. Petersen: "Why on earth are you embarrassed?"

Lilian removes all of her clothes.

Dr. Petersen: "Turn around. You have a very nice figure. 5-8 (5:00) You have nothing to be ashamed of. You should be happy and proud of your body. Have you ever wondered why you are embarrassed?" 5-9

Lilian: "No, I mean yes. 5-10 I don't know. That's how I am." 5-11

Dr. Petersen: "Sit up on the bed and cross your legs. I'll just test your reflexes."

Lilian sits on the couch and crosses her legs. He places a chair alongside and tests her reflexes by tapping below her knee-cap. 5-12

Dr. Petersen: "Now, lie down. Relax." (6:00)

Lilian lies flat on the couch with her left hand in front of her pubic hair and her right hand in front of her breasts.

Lilian: "Shall I?"

Dr. Petersen: "Not yet, just lie down and relax. This is not dangerous at all. All women are exactly the same as you under their clothes." 5-13

He walks over toward her.

Dr. Petersen: "It's easier to talk together if we use our first names. Speak frankly and tell me everything. You have to be naked in here - it's important - you must stop being embarrassed. 5-14 Relax. (7:00) Do you feel anything when I do this?" 5-15

He strokes his left hand softly along the length of her right arm. Her right arm moves involuntarily.

Lilian: "Yes."

Dr. Petersen runs his hands under her armpits.

Dr. Petersen: "Tell me exactly what you feel." 5-16

Lilian: "As if it went through my shoulders and right to my back." 5-17

He strokes her neck with his fingers and then makes an entry on the chart. He strokes her face with his fingers. 5-18 He removes her right hand from her breast area (8:00) 5-19 and places his left hand on her stomache, just below her left breast. The camera records her reactions. 5-20

His left hand massages her left nipple. 5-21 He places his mouth on her left nipple. 5-22

Dr. Petersen: "Sit up."

Lilian sits up.

Dr. Petersen: "How are you feeling?" 5-23

Lilian: "I'm feeling well."

Dr. Petersen: "Do you like anything special right now?" 5-24

Lilian: "No." (9:00)

He looks at her and she looks at him. She lies down on the couch and looks up at him. He places

his left hand under her right breast, then stokes her stomache, the area of her navel and her pubic region. 5-25 thru 5-28 Her body contracts. He removes his hands and walks back to his desk where he writes on a pad. She places her hands behind her head. (10:00) 5-29

Dr. Petersen: "Are you wet in the crotch?" 5-30

Lilian: "I don't know." 5-31

Dr. Petersen: "Feel for yourself."

Lilian: "Yes. I'm a little wet." 5-32

Dr. Petersen: "Your reflexes seem to be normal. 5-33 Turn around."

She turns around on her stomach. 5-34 He walks back to her. 5-35

Dr. Petersen: "Relax completely."

He places his left hand on her buttocks, then on her neck. He places both of his hands under her body in the area of her

breasts. 5-36 (11:00) Focus on her face as she reacts to his contacts. 5-37

Dr. Petersen: "Raise your behind a little." 5-38

He puts his left hand under her pubic region. Focus on her face. 5-39 His right hand rubs her back.

Dr. Petersen: "Now you can sit."

He walks back to his desk and sits down.

Dr. Petersen: "External reflexes are perfectly all right, no disorders at all. External examination is finished. You may dress now."

Focus on her face as she groans.

Dr. Petersen: "Is anything wrong?" 5-40

She sits up and faces him.

Lilian: "Is this examination already finished?" 5-41

Dr. Petersen: "All your reflexes function normally." (12:00)

She makes several inaudible sounds: "I...No...." 5-42

Dr. Petersen: "Have you any particular wish?" (No response.) "Then I think we are finished for today."

Focus on her. Focus on him. He gets up and walks toward her. He takes her clothes off the hook and hands them to her one

by one. He sits down on the chair.

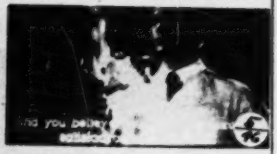
Dr. Petersen: "There is nothing wrong with the physical reactions. /5-43/ You are strong and healthy. It's the psychological we shall have to take care of. But I don't think we will meet with difficulties. In a few months you will be able to obtain an orgasm quite normally - of course we will proceed cautiously - little by little." (13:00)

Lilian: "I think I can already get it now."

Dr. Petersen: "No, you can't. You suffer from fear and guilt. You're shy - a prude. /5-44/ When you are with boys, this guilt complex spoils your pleasure. /5-45/ And you believe you can't get sexual satisfaction with them. /5-46/

Lilian: "Well, no I couldn't with Henry."

Dr. Petersen: "Tell me about Henry." /5-47/



SCENE 6 (13:35)
LILIAN RELATES HER SEXUAL EXPERIENCE WITH HENRY

Lilian: "Henry's parents were away. We went to his home after a school dance." /6-1/

Henry and Lilian enter the living room of Henry's parents. Henry is in a brown suit. Lilian wears a white skirt and a green shirt. (14:00) Henry turns on the light and takes a bottle of liquor out of a cabinet and pours drinks.

Lilian is looking at records. /6-2/ He takes two glasses and places the glasses on the cocktail table in front of the sofa. Lilian selects a record and Henry places it on the record player. /6-3/ As the music begins they sit side by side on the sofa and drink. (15:00) /6-4 thru 6-6/ He offers her a cigarette, reaches his hand into his pocket for a lighter and lights her cigarette. /6-7/

Lilian takes another drink. /6-8/ Henry gets up and walks toward the liquor cabinet. Henry lights a cigar. /6-9/ He walks back and sits down. (16:00) Lilian stands up, turns a table light on /6-10/

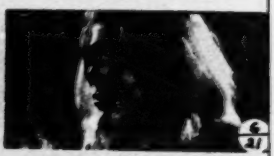
and turns the wall light off. /6-11/ She walks to the liquor cabinet and turns the other table light on. She returns to the sofa with the bottle and pours herself another drink. Henry moves over on the sofa and she sits down next to him. They click glasses and drink (17:00) /6-12/.

They put their drinks and smokes on the table. Henry leans over and puts his left hand through her hair and puts his right hand

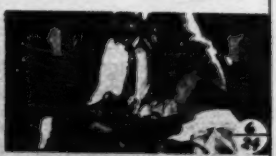
on her left breast and massages it. /6-13, 6-14/ They both reach for their glasses and drink together. They put their glasses down. Henry puts his right hand on her left leg and under her dress /6-15/.

Focus on her face. /6-16/ She pushes his hand away /6-17/ and takes another drink. /6-18/ She places her glass down and puts her left hand in the area of his sex organ. (18:00)

Focus on his face. /6-19/ She unbuttons his belt. /6-20/ Focus on her face - her eyes are closed. /6-21/



Focus on his face /6-22, 6-23/. She places her left hand inside his pants. /6-24/



Lilian: "Henry."

Henry: "Yes?"

She stands up and starts undressing. /6-25/ Focus on Henry watching her. /6-26/ She unzips and lowers her skirt, then unfastens her garter belt

and starts taking off her left stocking.

Henry starts taking off his shoes. 6-27 Camera pans on Henry watching her undress. Camera shows her nude except for her bra. (19:00)

Lilian: "You must not think that I'm like that." 6-28

Camera shows her completely nude. She steps over to him 6-29 and he stands up. He starts to unzip his trousers. 6-30 She walks away. He takes his trousers off and watches her. 6-31

She walks back (nude). Henry takes another drink. 6-32 She kneels down in front of him and pulls down his shorts. 6-33, 6-34

Focus on her face as she pulls down his shorts. 6-35 They stand facing each other and embrace. 6-36

Lilian: "Take your shirt off." 6-37

Henry takes his shirt off. (20:00)

They are now both nude. They embrace.

6-38

She lies on her back on the sofa. 6-39 He gets on top 6-40 and straddles her, putting his legs between her legs. 6-41 Focus upon her face. She begins to fight him. 6-42, 6-43

Lilian: "No, I don't want to." 6-44

She pushes him off.

SCENE 7 (20:25)
DR. PETERSEN ANALYZES LILIAN'S SEXUAL ENCOUNTER WITH HENRY

Dr. Petersen and Lilian are seated on the sofa talking.

Dr. Petersen: "Unfortunately many young girls react that way. 7-1 They feel ashamed. 7-2 And as a result they think too much about themselves. 7-3 They think they have the star role. In other words, shame and a sense of guilt. 7-4 Prudishness leads to a selfishness which destroys pleasure completely for themselves and their partner. 7-5 Is that clear?"

Lilian: "Yes, I'm not quite sure." (21:00)

Dr. Petersen: "We'll return to the subject later on."

The doctor stands up: "Come again tomorrow." He picks up a chart. "It is essential that you come every day. 7-6 I won't have as much time to attend you in the next weeks." 7-7

She stands up. He takes her coat and holds it up for her. She puts her coat on.

SCENE 8 (21:30)
LILIAN AND BRITA LEAVE
DR. PETERSEN'S OFFICE

Brita: "Was it bad?"

Lilian: "No, he seemed quite satisfied with me. 8-1 We'll have to come every day. Yes, until graduation 8-2 - but it won't take half an hour every time." 8-3

Lilian and Brita walk their bikes out to the street and ride away.

SCENE 9 (22:00)
LILIAN REVISITS DR. PETER-
SEN'S OFFICE

Lilian is lying on a table nude with Dr. Petersen beside her. Her hands are raised to shield her face.

Dr. Petersen: "You are still ashamed. 9-1 What I am doing gives you a bad conscience." (He takes her hands down from her face.) "You feel ashamed because you like it?"

Lilian: "Yes, that's the way I feel."

Dr. Petersen: "To do something wrong means to harm others, or hurt them, doesn't it?"

Lilian: "Yes."

He stands up and extends the leaf at the foot of the table. On the way he places his hand in the area of her vagina.

Dr. Petersen: "You wouldn't have a bad conscience if you didn't like what I'm doing." /9-2/

Lilian: "No, then it wouldn't matter." (23:00)

He walks around the other side: "The fact that you like it - that it pleases you, must harm somebody then, but who can it harm that you like it?" /9-3/

Lilian: "I don't know."

Dr. Petersen: "Does it harm anyone that you enjoy it?" /9-4/

Lilian: "What if my mother could see me?"

Dr. Petersen: "Yes, but isn't your mother a woman?" /9-5/

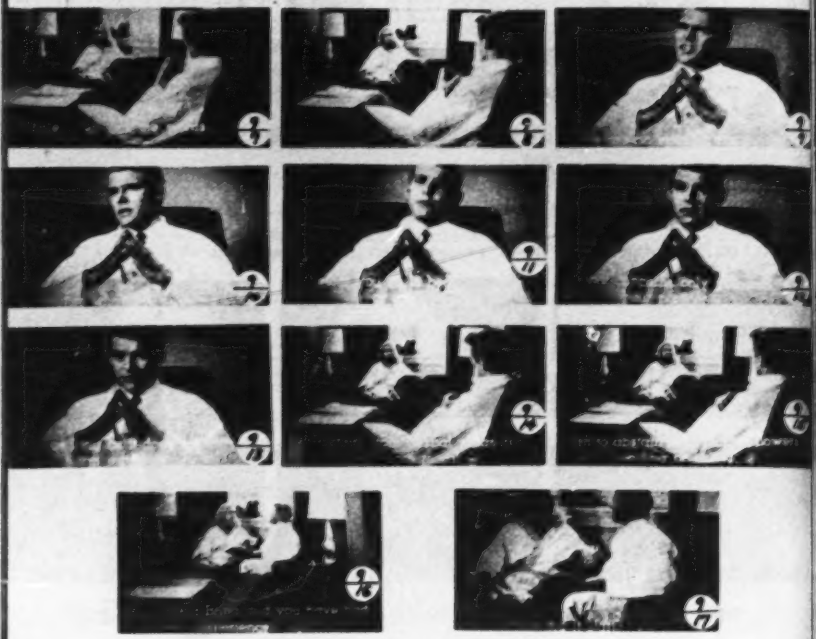
She sits up. He walks out to the bathroom and returns with a white robe which he hands to her.

Dr. Petersen: "I'd like to tell you a few things." /9-6/ (24:00)

He walks towards his desk. She puts the robe on and follows. He sits at his desk. She sits on the sofa. He leans back and talks to her.

Dr. Petersen: "People often use the words sex morals /9-7/, but it's a wrong expression. /9-8/ There are no specific sex morals /9-9/. No matter what you're doing, /9-10/ whether you're going to bed with boys or girls /9-11/, that concerns only you and your partner /9-12/, as long as it does not harm anybody /9-13/

To abstain from sexual pleasures is not more moral /9-14/ than to abstain from picking flowers, reading or skiiing. /9-15/ Your friend, Brita, and you have had many experiences together /9-16/. How did it start?" /9-17/



SCENE 10 (25:00)
SCHOOL PLAYGROUNDS

Lilian: "During excursion, we stayed at another school. Brita and I were quarrelling furiously /10-1/ and she said, while all the girls heard it, you're hysterical because you are as frigid as an old maid." /10-2/

Brita and Lilian fight. A teacher runs up and separates them.

Teacher: "What's the matter with you two? As a punishment you two girls will share the same room." /10-3/

SCENE 11 (26:00)

BEDROOM - LILIAN'S LESBIAN ENCOUNTER WITH BRITA

Brita and Lilian are in the bedroom.

Brita: "You may go to the bathroom first."

Brita watches /11-1/ as Lilian takes off her shirt, jeans, bra and panties. /11-2/ Lilian, now nude, walks into the bathroom. /11-3/

Lilian: "Those fools think that we are friends again." /11-4/

She closes the door behind her. Lilian is brushing her teeth at the sink. The door is opened by Brita who is now nude. /11-5/

Brita: "Then we might just as well be friends again." /11-6/

Lilian: "Yes."

Lilian takes a drink of water, then turns around. They face each other, embrace and kiss. (27:00) /11-7, 11-8/

Brita: "We are rriends, then?"

Lilian: "Yes."

Brita: "Let's go to bed. /11-9/ You may lie with me for a while, if you like." /11-10/

Lilian: "May I? Thanks."

They walk to the bed. /11-11/ Both are completely nude. Brita lies in the bed and extends her hand to Lilian. /11-12/ Lilian sits on the end of the bed. They face each other. /11-13/ Brita turns the light out. /11-14/

Brita: "It wasn't very nice for me to say that . . ." (28:00)

Lilian: "What?"

Brita: "That you were frigid. I didn't mean that. I'm sorry."

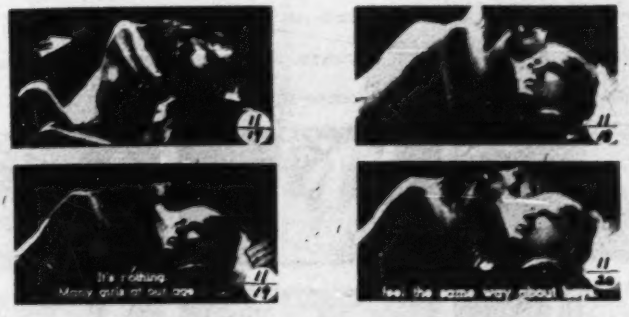
Brita sits up in bed and puts her left hand on Lilian's head.

Lilian: "Maybe it's true. I can't do it when I am with a boy." /11-15/

Brita sits up and embraces Lilian. /11-16/

Brita places Lilian flat on her back in bed. /11-17, 11-18/

Brita: "It's nothing. Many girls at our age feel the same way about boys." /11-19-11-20/



Lilian: "You too?"

Brita: "I did once. But can you when you are alone? /11-21/ When you play with yourself, do you get orgasm? /11-22/ When you do it to yourself, do you then get orgasm?" /11-23/ (29:00)

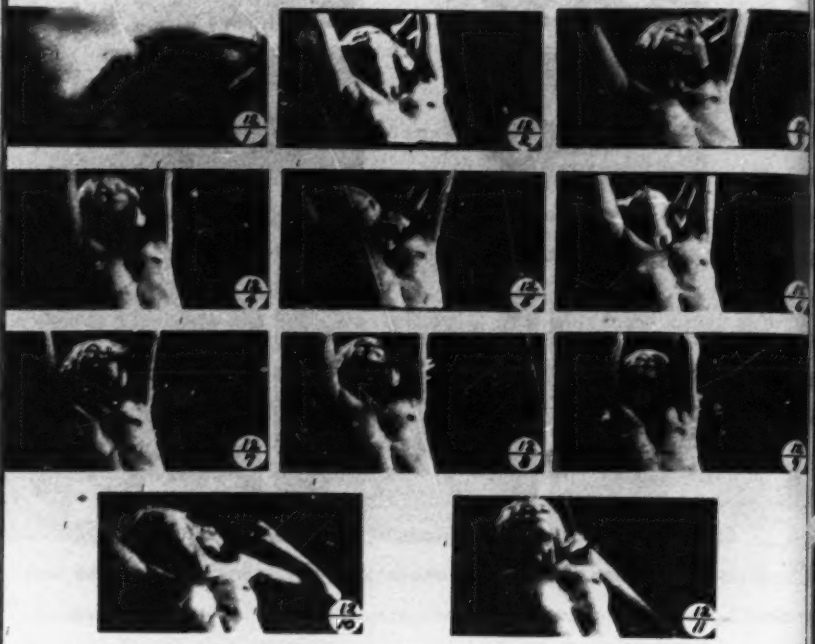
Lilian: "Yes, but I prefer to be with someone." /11-24/

Brita kisses her on the mouth /11-25/ - on the shoulder and then moves down between her breasts. /11-26/ Focus on Lilian's face. /11-27, 11-28/

SCENE 12 (29:30)
DR. PETERSEN PERFORMS ORAL SODOMY ON LILIAN IN HIS OFFICE

Scene shifts to the doctor's office. Lilian is lying nude on the table and Dr. Petersen's head is at her navel. /12-1/

His head moves down in the area of her pubic region. Lilian utters sexual sounds as she appears to have an orgasm as the doctor performs cunnilingus (oral sodomy). /12-2 thru 12-11/



SCENE 13 (30:15)
DR. PETERSEN ADVISES LILIAN, "I HAVE TO BECOME A HABIT."

Lilian is lying nude on the table. Dr. Petersen is fully clothed. He sits down alongside her.

Lilian: "Thank you." /13-1/

Dr. Petersen: "Now you mustn't think that everything is all right. /13-2/ I'll have to become a habit. Get more confidence. /1

You must not be dependent upon me, either. /13-4/ You must have complete confidence in yourself." /13-5/

Dr. Petersen walks over and sits down at his desk. Lilian sits up. (31:00)

Lilian: "We are already finished for today?" /13-6/

Dr. Petersen: "Yes. We can't enjoy ourselves at the expanse of Blue Cross." /13-7/

Lilian stands up and walks toward the bathroom. /13-8/ Dr. Petersen watches her. She emerges with her bathrobe on. She walks over to his desk (32:00) where he is writing. /13-9/

Lilian: " Doesn't it excite you at all?"

Dr. Petersen: "Yes, it does, but first of all I'm a scientist, /13-10/ collecting statistical materials about young women's inhibitions. A work of great importance to the gynecological psychiatry. But that's beside the point. I'm a doctor and I nave to help you /13-11/ and teach you that when you think more about your partner's orgasm, then you are grown up and it's only then that you can find full satisfaction. (33:00) You have to think more about your partner's desire. If you don't do that, it can have terrible consequences."

Lilian: "That's why it ended that way, between Henry and me." /13-12/

SCENE 14 (33:10)
CONTINUATION OF LILIAN'S SEXUAL
EXPERIENCE WITH HENRY

Henry is lying on the floor on his stomach, reading. Lilian is lying alongside him but facing in the opposite direction. Both appear to be nude from the waist down.

Henry: "Won't you let me do it today?" /14-1/

Lilian: "No, Henry, it will spoil everything." /14-2/

She raises her right leg and runs it along Henry's right arm. /14-3/ He reaches around and pulls her shirt. /14-4/ She turns around and kisses him. /14-5, 14-6/ (34:00) He falls back. She moves over and kisses him. Her left hand moves down his body. /14-7/ Focus on his face showing pleasure. /14-8/ Scene shifts and they continue to kiss.

Lilian: "Sit down in that chair over there." /14-9/

Henry gets up and sits in the chair. Both are nude except

for shirts.

Lilian: "Near the edge and lean back." /14-10/

She sits in the chair on top of him, facing in the same direction. /14-11/ She gets off him.

Lilian: "No, that armchair is softer." /14-12/

He stands up and sits in the armchair. (35:00) She sits in his lap. /14-13/ He moves, She jumps up. /14-14/

Lilian: "If you move, I won't let you." /14-15/

She walks toward him and sits in his lap, straddling him. /14-16/ He puts his hand behind her buttocks.

Lilian: "Is that all right?" /14-17/

Henry: "Yes."

She puts her hands on his shoulder and moves back and forth sexually. Camera registers sexual emotion on Henry's face, /14-18/ and he utters sexual sounds. Lilian laughs. /14-19/ He pushes her away and stands up. /14-20/

He bends her over a chair and spanks her buttocks /14-21, 14-22/ (36:00). He bends her right hand behind her back and pushes her down on the sofa. /14-23, 14-24/ He raises a poker /14-25/, then throws it away and falls down on top of her, breathing heavily. /14-26, 14-27/ He changes his mind and stands up.

Henry: "Go to hell." /14-28/

He leaves. Camera pans on her as she watches him leave. /14-2

SCENE 15 (36:40)
DR. PETERSEN ADVISES LILIAN, "YOU HAVE TO LEARN HOW TO BE ACTIVE."

Dr. Petersen and Lilian are seated on the sofa talking.

Lilian: "How ignorant and wicked I've been for both of us. /15-1/ I really like him, you see."

Dr. Petersen: "Next time you meet a Henry you have to train him and make a good lover of him. /15-2/ First, you must only think of him. /15-3/ (37:00) Secondly, you must not be shy, /15-4/ and thirdly, you must know how to do it. Many women are so inhibited that they forget to be active. /15-5/ You have to learn how to be active, do you understand?" /15-6/

Lilian: "Yes."

SCENE 16 (37:20)
SIDEWALK SCENE - HENRY IGNORES LILIAN

Lilian is seated on a bench. /16-1/ Henry walks on the sidewalk towards her. /16-2/ She stands up and calls to him. He walks past her and refuses to recognize her. /16-3/

SCENE 17 (37:40)
DR. PETERSEN SAYS, "IT'S YOUR TURN TO BE ACTIVE" -
SEXUAL INTERCOURSE BETWEEN DOCTOR AND LILIAN

Dr. Petersen and Lilian stand facing each other-both are nude.

Dr. Petersen: "Now it's your turn to be active." /17-1/

Lilian walks over to the examination table and extends the table leaf to its full length. /17-2/ (38:00) She pulls up a chair and walks toward him. She looks down in the direction of his pubic area /17-3/ and motions him to the table. /17-4/ He lies on the table. /17-5/ She sits down and puts her left hand on his right breast and manipulates his nipple. /17-6/

Dr. Petersen: "Gently - gently. Be careful not to frighten a new Henry to death. 17-7 (39:00) You just have to find out what I like best, that's all."

She takes his left arm and lightly strokes it in different areas. 17-8 She places his left hand down and runs her fingers lightly around the area of his lips. She puts her left hand on his right nipple. He places his arms behind him and rests his head on his hands (40:00). She bends over and puts her mouth on hi right breast. 17-9 She sits up and resumes stroking his chest.

Lilian: "How are you feeling?" 17-10

Dr. Petersen: "Fine, thank you."

She puts her left hand on his breast and kisses his chest. 17-11 She moves her head down in the direction of his pubic area. Camera focuses on facial expressions of doctor. 17-12, 17-13, 17-14 She straddles him on the table. 17-15

Longshot of the two in sexual contact with Lilian on top of the doctor. 17-16, 17-17 Her hands are on his shoulders and she moves back and forth on his body. Camera pans up on her from the doctor's position below 17-18 then down on him from over her shoulder as they move in sexual contact. 17-19 (41:00) He pulls her down on top of him and they kiss. 17-20 She moves to a position alongside his left side and he puts his left hand under her head.

Dr. Petersen: "That's a situation you will often meet with. 17-21 He gets orgasm before you. 17-22 What will you do now?"

She sits up.

Lilian: "Wait and see."

She walks toward the bathroom. He turns around and looks off to the bathroom, with his head resting on his arm. (42:00) She approaches with a pan of water, soap and a towel.

Dr. Petersen: "You learn quickly." 17-23

SCENE 18 (42:15)
LILIAN GRADUATES. DOCTOR GIVES HER A DIARY

Lilian enters in a white dress, carrying roses and a silly hat, humming "Gaudianos Igiter". 18-1

Dr. Petersen: "Congratulations:"

He stands up and faces her: "Now I think you can manage."

She reaches over and kisses him.

Dr. Petersen: "But, of course, you can't always come to me. /18-2/ You'll have to gain experiences of your own. /18-3/ Now you're going on vacation?"

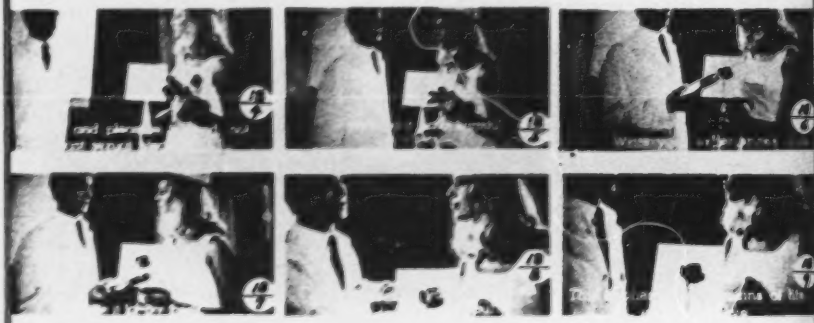
Lilian: "Yes. Going to hitch-hike around Europe."

Dr. Petersen: " Then make use of your new knowledge. All joy and pleasure is good - not least sexual pleasures /18-4/ - provided it is not harmful to others, /18-5/ but gives happiness and enriches life. (43:00) Write your experiences down. /18-6/ I'll use them for my thesis." /18-7/

·He gives her a red book.

Lilian: "I won't forget."

Dr. Petersen: "Just keep in mind the greatest of all morals- Do to others as you wish others to do toward you. /18-8/ This applies to all domains of life, especially love. /18-9/ Have a nice trip."



SCENE 19 (43:30)
LILIAN THUMBS A RIDE WITH GÖRAN, A CAMERAMAN

Lilian walks along the highway. 19-1 A panel truck with "Vitalia Film" written on the side, approaches. She "thumbs" a ride and the driver stops. (44:00) 19-2

Göran: "Get in."

She throws her knapsack in. The driver looks at her through a monocle.

Göran: "My name is Göran, a cameraman." 19-3

Lilian: "Lilian, student." 19-4 The car drives off. 19-5

Göran: "Cigarette?"

He reaches for a cigarette and places one in his mouth. He lights the cigarette. The mileage ticks off to show the passage of time.

Göran: "Can you find some music?"

Lilian: "I'll try."

He hands her a portable radio and she tunes in to some music. 19-6

Göran: "It's hot." (45:00) (The meter ticks away.) "Will you help me take off my coat?"

She helps him remove his coat. 19-7 He unbuttons his shirt. The meter continues to tick away.

Göran: "I have a bottle of rum. We could fix a drink."

She pours the rum into a glass.

Göran: "More - there's plenty of it. Go on, there's plenty of rum." (46:00)

They drink from paper cups.

Göran: "Skol." Lilian: "Skol."

The car continues down the road. (Passage of time.) He lights another cigarette. 19-8 (47:00) She has two glasses in her hand. The car lurches and Göran moves, his right hand landing on her knee. 19-9

Göran: "Sorry."

Lilian: "Oh, it's all right." 19-10

Camera pans on his hand on her knee and then focuses on the red book. Offscreen the doctor's voice is heard to say: "All joy and pleasure is good. 19-11 provided it is not harmful to others. 19-12 All that gives happiness and enriches life 19-13, not least sexual pleasures." 19-14 (47:00)

His right hand remains on her leg as they continue to drink. Lilian: "Skol." Göran: "Skol."

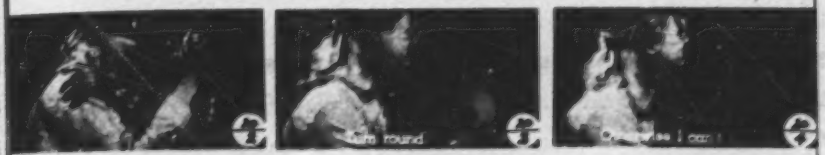
SCENE 20 (47:20)
LILIAN AND GÖRAN HAVE INTERCOURSE IN REAR OF PANEL TRUCK

Car stops in the middle of the road. Both climb into the rear of the panel truck through the rear doors. 20-1

Göran: "I'll tidy up a little in here.

They both kneel on the floor. Camera pans on mouth to mouth kiss. (48:00) 20-2

Göran: "Turn around. 20-3 Otherwise I can't. 20-4



I'll have to be on all fours. 20-5 There's no room in here." 20-6

Lilian turns around and starts to unbutton her trousers. 20-7

She lowers her trousers. Göran unzips and lowers his trousers. Lilian reaches over and pulls down his shorts. 20-8 Göran kneels behind her, (49:00) and they both begin sexual activity and breathe heavily. Outside shot of the car rocking from the activity inside. 20-9 Camera moves inside again.

Göran: "Ah, that was marvelous." 20-10

Lilian is leaning on her right arm and Göran is leaning on

her back, with his hands on her shoulders. He backs off, stands and pulls up his trousers. (50:00) Lilian stands up and pulls her panties back up. He helps her pull up her trousers. /20-11/ She zips up her trousers and they both sit down on the floor. He puts a cigarette in his mouth.

Göran: "I've just been up north shooting a film. A crime movie."

He gives her a lighted cigarette.

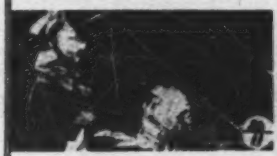
Göran: "I have to take a lot of equipment along. I have a bottle of rum here."

He reaches back for the bottle of rum. (51:00)

Göran: "I'd rather like to . . . to film you."

They both drink.

Göran: "Of course, it would be a somewhat frivolous film. /20-12/ You'll have to appear without a stitch." /20-13/



Lilian: "Mooo, I don't think . . . ."

Göran: "You'll get 3000 kroner." /20-14/

Lilian: "3000?"

Göran: "O.K. 4000 kroner." /20-15/

Lilian: "4000 Swedish kroner."

SCENE 21 (51:30)
LILIAN AND GÖRAN DRIVE TO VITALIA FILMS IN SWEDEN

Scene shifts to Sweden and photographs of Swedish landscape.

/21-1/ Camera moves to inside of a movie building, "Vitalia

Film". 21-2

SCENE 22 (52:00)
LILIAN IS MADE UP FOR STAG FILM

Lilian is sitting in a chair and they are preparing her for a movie.

Makeup Man: "You may be a little surprised, but it is necessary." 22-1

They shave her pubic area. "And now to the wash basin."

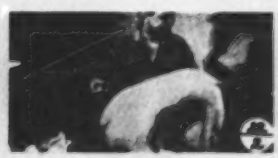
Lilian leans back in a chair. He takes a sponge and rubs the front of her body.

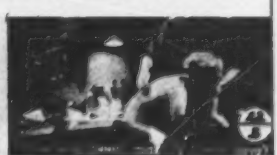
Lilian: "Why all the makeup?"

Makeup Man: "Film is the opposite of nature. To look natural in the film you have to wear unnatural makeup."

She turns around and kneels in the chair, while he applies makeup to her back. 22-2

Lilian: "Have you been making films long?" 22-3





Makeup Man: "All my life I have been making artistic films, also in Denmark. They are always about the same things as this. I am sick and tired of them. This kind of film are more healthy and straight forward and also a little more risky." (53:00)

She turns around and sits back in the chair again.

Makeup Man: "And now the wig."

Lilian: "Can one be severely punished?"

Makeup Man: "One could get several years. We never sell

them in this counrty. /22-4/ We send them to foreign countries as microfilms." /22-5/

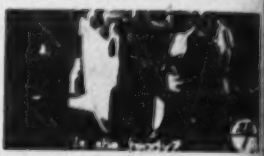
A man comes in.

Makeup Man: "We are ready."

SCENE 23 (53:40)
LILIAN PERFORMS IN A STAG FILM

Camera shifts to movie set. Lilian is nude.

First Male: "Is she ready?" /23-1/



Second Male: "She's pretty, eh?"

First Male: "I hope so."

Lilian is introduced to two nude males.

Male: "May I introduce Alf - Lilian - Nick. /23-2/ You go to bed and lie down." (54:00) /23-3/

Nick walks away. Lilian lies on the bed on her back. Alf lies on her stomach and kisses her. /23-4/

Male: "Stop! You're not here to pet for pleasure. A decent conduct please."

Göran: "More light here. This is hard, but honest work. I'll instruct you point by point. /23-5/ Remember to do exactly as I tell you. As regards Alf, take care that nothing happens.

Do you think you can manage? Stop every time Alf is going to have orgasm. 23-6 You lie down. Then you sit on her. 23-7 Then you lie down and she sits on you." (55:00)

Göran moves away from them. Lilian lies down on her back and Alf mounts her for sexual activity. 23-8 Focus on her face. 23-9 Back to the camera. Alf lies on his back with Lilian on top of him. Focus on his face. 23-10

Göran: "We'll place the camera over there." (He moves camera)

Director: "Alf will you lie down there. Lilian you lie down and put your legs on his shoulders. That's it. Fine!"

Camera pans to Lilian's legs on his shoulders. (56:00) Scene shifts.

Göran: "We must have more light. Heine, please."

Cameraman shooting.

Director (to clothed male and female): "Gita and John come here."

Male carries the brunette ove. Throws her in the bed and jumps on top of her.

Director: "You play Lilian at the foot of the bed, 23-11 (57:00) and you come from behind. You lean forward. You raise yourself against her."

The female bends over the bed and the male stands directly behind her.

Director: "Gita, spread your legs more."

The brunette spreads her legs.

Director: "You take her breasts with both hands /23-12/ - - I said the breasts - (the male follows directions) - and put both hands under her on her breasts. /23-13/ More light. That's fine. We'll take it - with them. Change the sheets."

Lilian and Alf, both nude, take the same positions.

Director: "Now it's your turn - you do exactly the same, but better /23-14/ . . . and this time you may finish it." /23-15/

Lilian and Alf stand up. Lilian bends over at the foot of the bed with her hands on the bed. Alf is behind her with his hands on her breasts.

Director: "Turn your face toward the camera. /23-16/ (58:00) And now . . . start."

Lilian and Alf move back and forth in sexual contact. /23-17 thru 23-22/

Director: "Alf, now."

They increase their tempo and utter orgiastic sounds. Both fall forward on the bed.

Director: "That's fine. Switch off the light. (58:20) Splendid! A fantastic ending!"

/23-23/

They are both lying on the bed.

SCENE 24 (58:20)
LILIAN RECEIVES HER PAY

Scene shifts. Lilian, Göran and Alf are drinking and talking.

Göran: "Lights on. Excellent. I nearly got jealous /24-1/. Go and have a bath now. After it I'll write you a check. Alf . . I'll send you the money. I'll be seeing you."

Alf: "Goodby then, Lilian, and thank you." /24-2/

Alf kisses Lilian on the forehead. Scene shifts to room where Lilian, the director, and Göran are talking. Lilian is fully clothed.

Lilian: "It was very good, don't you think?"

Göran gives her a check and kisses her on the nose. (59:00)

Göran: "Here is your check."

Lilian: "Thank you."

Göran: "You're always welcome."

/24-3/

Scene shifts to the bank. The bank clerk is counting the money. /24-4/ Lilian picks up the money and walks outside. She visits a bookstore and looks at the books. Camera zooms in on the book title and scene changes.

SCENE 25 (60:00)
LILIAN'S BEDROOM - SHE MAKES A DIARY ENTRY

Lilian is in her bedroom, dressed in a pajama top. She lies on the bed, crosses her legs, opens the red book, and starts to write in it.

Lilian: "Dear Doctor. As a doctor you will be glad to hear that your former patient has now completely recovered." /25-1/

SCENE 26 (60:40)
LILIAN DEPARTS FOR DENMARK

Scene shifts outside. A sedan drives up and Lilian, a male and a female get out. Lilian is dressed in blue jeans with a white shirt with red sweater. She shakes hands with both and walks away from them. /26-1/

SCENE 27 (61:10)
LILIAN VISITS COPENHAGEN

Scene shifts to Copenhagen and photographs of Danish landscape. /27-1/

SCENE 28 (61:45)
CAFE - LILIAN MEETS LISE

Camera shifts to a cafe. /28-1/ A blonde, Lise, enters. (62:0 She is escorted to a table where Lilian is sitting. She sits down. Lise hands Lilian a cigarette and lights her cigarette. /28-2/

SCENE 29 (62:35)
LILIAN VISITS LISE'S APARTMENT

Scene shifts to cocktail table and liquor bottles in Lise's apartment. /29-1/ Lise takes two glasses and gives one to Lilian. They both drink. (63:00)

Lise: "I'm studying architecture." /29-2/

Lise kneels on the bed. Lilian walks away and surveys the apartment furnishings.

Lilian: "Your parents must be rich."

Lise: "No, I don't even get money from them to pay rent. Other people pay for all of these things." /29-3/

Lilian: "Who?"

Lise: "Embassies."

Lilian sits in a chair: "Don't you have to study during the day?"

Lise: "I only work at night."

Lilian: "Are you a spy?"

Lise laughs: "Shall I show you how I make a living?" /29-4/

Lise leans over and puts her glass down. (64:00) Camera focuses on Lise, who now has her trousers off.

Lise: "That's how." /29-5/ (She lies flat on the bed.)

Lise: "But I'm only doing it when I feel like it. /29-6/ Now and then I feel like something else. /29-7/ I want to see you."

Offstage voice of Dr. Petersen is heard to say: "No matter what you are doing, whether you go to bed with boys or girls, /29-8/ that concerns only you." /29-9/

Lilian sets her drink down, walks toward Lise and starts undressing. Lilian, now nude, lies down on the bed. (65:00) They click glasses. Both drink. /29-10/

Lise: "You'll have to take a bath." /29-11/

SCENE 30 (65:15)
LILIAN AND LISE SHOWER TOGETHER

Scene shifts to the bathroom. Lise, now nude, stands outside the shower and sprays water on Lilian's pubic area in the shower. Lilian sinks to the floor. /30-1, 30-2/

Lilian: "Shall I shower you a little?"

Lise: "No, I'm the hostess here. Stand up will you." /30-3/

Lise turns the water off and they both stand up. Lise puts a towel around Lilian's shoulders.

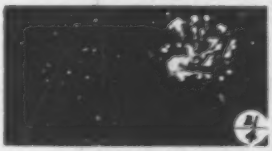
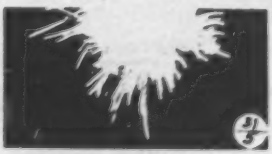
Lise: "Go into the bedroom and lie down and I'll show you something which will be new to you. /30-4/ Promise you won't get scared." /30-5/

SCENE 31 (66:00)
LISE'S BEDROOM - LESBIAN ACTIVITY WITH ARTIFICIAL MALE PENIS

Scene shifts to bedroom. Lilian is lying nude on the bed /31-1/ looking at Lise as she approaches with an artificial penis (dildo) in her hand.

Lise: "Have you seen this sort of thing before? /31-2/ It never gets soft, it's always ready." /31-3/

She lowers the towel and moves toward the bed. Photo of fireworks bursting in the sky. /31-4, 31-5/

SCENE 32 (66:25)
LISE'S KITCHEN

Scene shifts to kitchen on the next day. Both are dressed. Lise pours coffer for Lilian at the breakfast table.

Lise: "Were you satisfied yesterday?" /32-1/

Lilian: "It was all right, but something was lacking." /32-2/

Lise: "Today we shall have a party. I have invited a third party."

Lilian: "A man?"

Lise: "Yes, a real man for both of us." 32-3

SCENE 33 (66:50)
SEX ORGY - LILIAN, LISE AND A MALE

Scene shifts to evening. (67:00) Lilian, Lise and a male are standing in conversation. All are nude except for brief aprons. 33-1, 33-2

Lilian: "Look, isn't it nice?"

Lise: "It's quite ordinary really."

Male: "No, we must open that bottle, now."

Both walk away. Lilian sits in a chair. Lise stands behind her, reaches forward and lifts Lilian's apron for the male's benefit.

Lise: "She has been shaved. Doesn't it look nice?" 33-3

Male: "Yes, it suits her. 33-4 One can get a better idea of the very shape and anatomy. 33-5 I rather like it. People did it in the 18th Century - both men and women. Excuse me ladies, the bottle has to be opened." (68:00)

Scene shifts. They are seated at a table eating and drinking by candle light. Each one eats and drinks in silence while look-

ing intently at the others. Camera focuses on the male cutting his meat, placing it in his mouth and chewing on it while leering at the females. Lilian and Lise follow suit with wine, /33-6 thru 33-10/ olives, carrots and pears. (69:00) Camera backs away.

They stand up, join hands and dance into the living room where they engage in a dance to folk music. /33-11, 33-12/ The male and Lilian dance while Lise watches, then all three dance together. (70:00) The male pulls the ties on their aprons and the aprons fall.

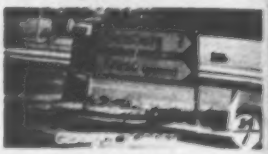
They are all completely nude. The three walk toward the bed. /33-13, 33-14/ The male lies on the bed. /33-15/

Lise proceeds to the side of the bed nearest his head and straddles him so that his head is in her pubic area. Lilian proceeds to the foot and straddles him so that his pubic area is opposite her pubic area. /33-16, 33-17, 33-18/ (71:00)

Scene shifts to outside the building the next day. The two girls, now clothed, kiss and say goodby. He kisses her hand and she walks away.

SCENE 34 (71:15)
LILIAN VISITS HAMBURG

Scene shifts to German border. 34-1 Lilian in blue jeans, red sweater with a white shirt, approaches a guard who looks at her passport. The guard salutes her and she walks away.



SCENE 35 (71:40)
CAFE - LILIAN MAKES ANOTHER DIARY ENTRY

Scene shifts to Lilian seated at a dining table, writing.

Lilian: "Yes, dear Doctor, I experienced something new in Copenhagen. 35-1 Something you never told me about. (72:00) The new way of bathing is nice. The substitute, while quite good, but . . . . The best of it all was that party for three. 35-2 I've had a rest at this end and shall continue my journey.

SCENE 36 (72:30)
LILIAN VISITS GERMAN BEER HALL

Camera pans on German landscape in Hamburg. 36-1 (73:00) Lilian runs down stone steps and enters a bookstore and examines the books.

Scene shifts. Lilian walks along the street at night. She walks into a building. (74:00) Scene shifts to inside. Men are at tables drinking beer. She sits in a chair at a table alongside a man. He motions for a waitress who sets two beers upon the table. A German band enters and takes its place. Camera pans on various activities - a group dancing scene. (75:00) Longshot of the female entertainer with the band, leading the band, 36-2 -- dancing scene. The male asks Lilian to dance. She looks around and appears to be disturbed by the noise and the dancing. 36-3 Lilian rushes out of the restaurant.

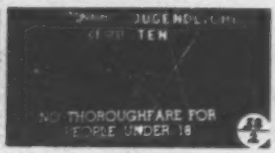
SCENE 37 (76:00)
LILIAN VISITS FEMALE WRESTLING MATCH

Scene shifts to another building where she is seated at a table. A blonde and brunette in tights and bras enter the arena which is filled with mud and they start to wrestle. 37-1 The camera focuses on the men cheering. 37-2 (77:00)

Lilian frowns at what she sees. 37-3 The blonde throws the brunette over her shoulder and lands on top of her. Lilian leaves abruptly without paying. The waitress stops her outside. 37-4 Lilian gives the waitress money, picks up her knapsack and books and runs off. (78:00)

SCENE 38 (78:15)
LILIAN COLLIDES WITH KURT NEAR RED LIGHT DISTRICT

She runs into what appears to be a "Red Light" district. The camera pans on prostitutes jeering at her from their cribs. /38-1, 38-2/ She runs across the street and into some men. She turns and runs into another man (Kurt) coming out of a store. /38-3/



Kurt: "Can I be of any help?" (79:00)

Lilian: "Yes, take me away from here, please."

Kurt: "Of course, my car is over there."

SCENE 39 (79:10)
KURT'S CAR - LILIAN ACCEPTS DINNER AT HIS HOME

They get into his car and drive off Kurt is wearing a business suit and Homburg. Camera pans on the two as he drives along. Kurt offers her a cigarette and lights it.

Kurt: "May I take you to your hotel?" /39-1/

Lilian: "I haven't found any yet."

Kurt: "Haven't you had anything to eat?" /39-2/

Lilian: "No." (80:00)

Kurt: "Let's have dinner at my house, /39-3/ if you don't have any objections."

Lilian: "No."

Lilian's voice is heard offstage: "Yes, dear Doctor, I feel like having dinner with him. /39-4/ The way he behaves makes me feel at ease. /39-5/ You taught me to tell myself, /39-6/ I feel like this and that without being ashamed." /39-7/ (Aloud): "Yes,

I'd love to have dinner with you."

SCENE 40 (80:30)
DINING ROOM IN KURT'S HOME

Scene shifts. The dining room in Kurt's house. Kurt and Lilian are seated at a table. Servant brings in food and wine. (81:00) Camera pans on several scenes as they eat and drink an elegant dinner served by a male servant. /40-1, 40-2/ (82:00)

SCENE 41 (82:15)
KURT'S BEDROOM - MASOCHISM AND SADISM

Scene shifts to the bedroom. Kurt, in a dressing gown, is standing holding a whip. /41-1/ Lilian faces him in the nude, her right hand on her pubic area and her left hand in front of her breasts. /41-2/ He walks around her, holding the whip. /41-3/

Kurt: "You need not be afraid. It hardly hurts, but don't scream too loud. Lie down over there." /41-4/

She moves over to the bed and lies down. He begins striking

her with the whip. 41-5 Camera focuses on her breasts - her face - his face 41-6 - her buttocks - his face when he stops. (83;00) She sits up.

Kurt: "Hit me, it's your turn now. 41-7 Do it please. 41-8 You need not be afraid." 41-9

He takes off his gown and throws himself down on the bed, nude. She strikes him with the whip. Camera focuses on his face as he appears to have had an orgasm. 41-10, 41-11, 41-12 Camera focuses on her bare buttocks, showing welts.

SCENE 42 (83;45)
LILIAN VISITS ZOO

Scene shifts to Lilian at the zoo: "Dear Doctor - The zebra will always have its stripes. 42-1 I hope mine will disappear. (She is looking at the zebras.) That was a strange experience. I didn't like it. But as you say, one must learn for one's self. 42-2 (84;00) Like boys, girls also have to sow their wild oats." 42-3

She walks out of the zoo, carrying her knapsack and books.

SCENE 43 (84:20)
LILIAN THUMBS A RIDE TO ITALY WITH FREDDY

Lilian walks along the street, attempting to thumb a ride. A red M.G. driven by Freddy stops. (85:00)

Freddy: "How do you do - my name is Freddy." 43-1

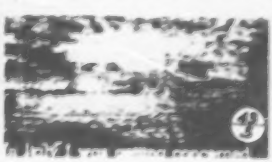
Lilian: "How do you do - Lilian - where are you going?"

Freddy: "I'm going to Italy."

Lilian: "Italy - all right, then we'll go to Italy."

She jumps in the car and they drive off.

Lilian: "Freddy was an art expert. We drove together for four to five days through Germany. He told me lots of things about buildings, architecture, and about art. We had a lovely time. Freddy was very nice and charming. We stayed at the same hotel, always in separate rooms. 43-2 (86:00) I found it rather strange but I was somewhat exhausted so it was quite relaxing. We left Germany. I was feeling fine again and I liked Freddy more and more. In Italy I was getting concerned about having separate rooms, 43-3 and he was not making any advances at all. 43-4 Was there anything wrong with me? When we arrived in Rome - yes, we had seen some of the sights. I decided to get it over with. We were seated at a table."



SCENE 44 (86:45)
LILIAN AND FREDDY AT SIDEWALK CAFE IN ROME

Lilian: "Freddy, do you like me?" /44-1/

Freddy: "Yes, I like you very much."

Lilian: "You never thought of kissing me?"

Freddy: "I often think of that, and a lot of other things." (87:00)

Lilian: "Freddy, is there anything wrong with me?"

Freddy: "Good heavens, no."

Lilian: "Don't you want to go to bed with me?"

Freddy: "I certainly want to, but I don't think you would enjoy it."

Lilian: "Why?"

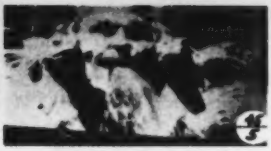
Freddy: "I'm not able to satisfy you - not in any way you would like."

Lilian: "It doesn't matter what I like. You should enjoy it. You must do exactly what you want to." /44-2/

Freddy smiles and looks at her. He puts the money for his bill down on the table and they walk away.

SCENE 45 (87:45)
BEDROOM SCENE WITH FREDDY - SODOMY

Lilian and Freddy are in bed. Freddy is on his back with Lilian alongside on his right side. Her right hand strokes his chest. /45-1/ (88:00) and then goes under the sheet to his pubic area. /45-2/ Freddy turns toward her and moves under the sheet to the bottom of the bed. Camera shifts to a longshot of the two. Lilian is on her knees and hands in bed with Freddy to her rear in a sodomous position. Camera focuses on her face. /45-3, 45-4/ Camera pans on a spouting fountain. /45-5/



SCENE 46 (88:45)
LILIAN PERFORMS SIMULTANEOUS SODOMY AND INTERCOURSE WITH FREDDY AND HIS FRIEND

Next day. Freddy and Lilian emerge from a building. She throws her knapsack in the car and Freddy places a pillow on the seat for her to sit on. /46-1/ (89:00)

Lilian: "We met Antonio in Naples. /46-2/ He was an old friend of Freddy's and that meeting gave pleasure to the three of us."

Camera pans on scenes of simultaneous sodomy and intercourse with Lilian, Freddy and his friend. /46-3 thru 46-6/

SCENE 47 (89:40)
HIGHWAY - LILIAN MAKES A
THIRD DIARY ENTRY

Lilian: "But then I needed to be alone."

Scene shifts. She is walking alongside the highway. 47-1 She stops and makes an entry in her diary. (90:00)

Lilian: "Dear Doctor. Now I have been alone long enough. I am starting on the last lap of my journey.

SCENE 48 (90:25)
LILIAN VISITS PARIS

Scene shifts to Paris. 48-1 Camera pans on Parisian landscape.

Camera shows her in a bookstore paying for some books. (91:00) Focus on her collection of books.

SCENE 49 (91:00)
LILIAN MEETS A GOATEED MALE IN PARIS

She is seated on a green bench at the Eifel Tower. A goateed male runs down the stairs and looks at her. She returns his glance. She takes a cigarette in her hand. The male grabs a box of matches from another man and approaches Lilian.

Male: "May I?"

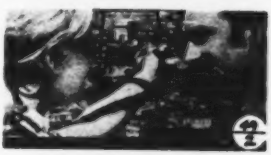
Lilian: "Thanks." 49-1

Male: "All these people carry matches. Quite remarkable - convenient for us who haven't any. How long have you been in Paris? Only one day? You haven't seen the city then?" (92:00)

Lilian: "Not yet."

Male: "Would you like for me to show you? There's a fine view from here."

They look at each other and then out over the city. 49-2



Male: "This is the Champs Elysees - Montmart."

They hold hands.

Male: "I'll take you there."

They exit the building and enter a small car. 49-3 They drive off. Street scene. The small car is stopped in the middle of busy traffic in Paris. (93:00) Camera zooms in on the front of his car, which is rocking back and forth without any driver.

49-4

SCENE 50 (93:20)
LILIAN BUYS NEW CLOTHES AND LEAVES PARIS

Focus on Lilian purchasing a dress and matching coat in Paris

shop. /50-1/ Male attendant hands her a pink hat, which she places on the back of her head. (94:00) Scene shifts to her walking along the sidewalk where two men turn around and talk to her. /50-2/ His male companion runs up to her with a rose and kisses her. /50-3/ She walks into the airline office.

SCENE 51 (94:35)
LILIAN MEETS HENRY ON PLANE

Lilian walks down the aisle of her plane and sits down. Henry is one of the passengers. She moves to the seat next to the window and he sits alongside of her. /51-1/ (95:00)

SCENE 52 (95:10)
LILIAN REVISITS DR. PETERSEN'S OFFICE -
THE MESSAGE

Lilian revisits Dr. Petersen's office and hands him her diary.

Dr. Petersen: "I am glad to know that you have understood what I meant and glad you learned for yourself." /52-1/

They sit side by side on the sofa. /52-2/

Dr. Petersen: "One can tell by looking at you."

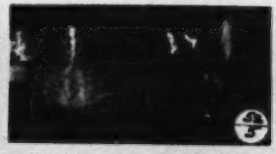
Lilian: "Thanks. I hope I've been of some help with your thesis. Thank you for helping me."

She stands up and walks away. She looks back at him. /52-3/

Lilian: "You encouraged me to meet all the people who taught

me that life is wonderful."

She looks off in the distance and sees the people she had sexual experiences with. /52-4 thru 52-8/



Lilian: "The German I didn't like at all, but thanks to your teaching I could give pleasure to others and find myself." (96:10)

Closeup of the doctor looking at her. Closeup of Lilian, turning around and looking at the doctor. (96:25)

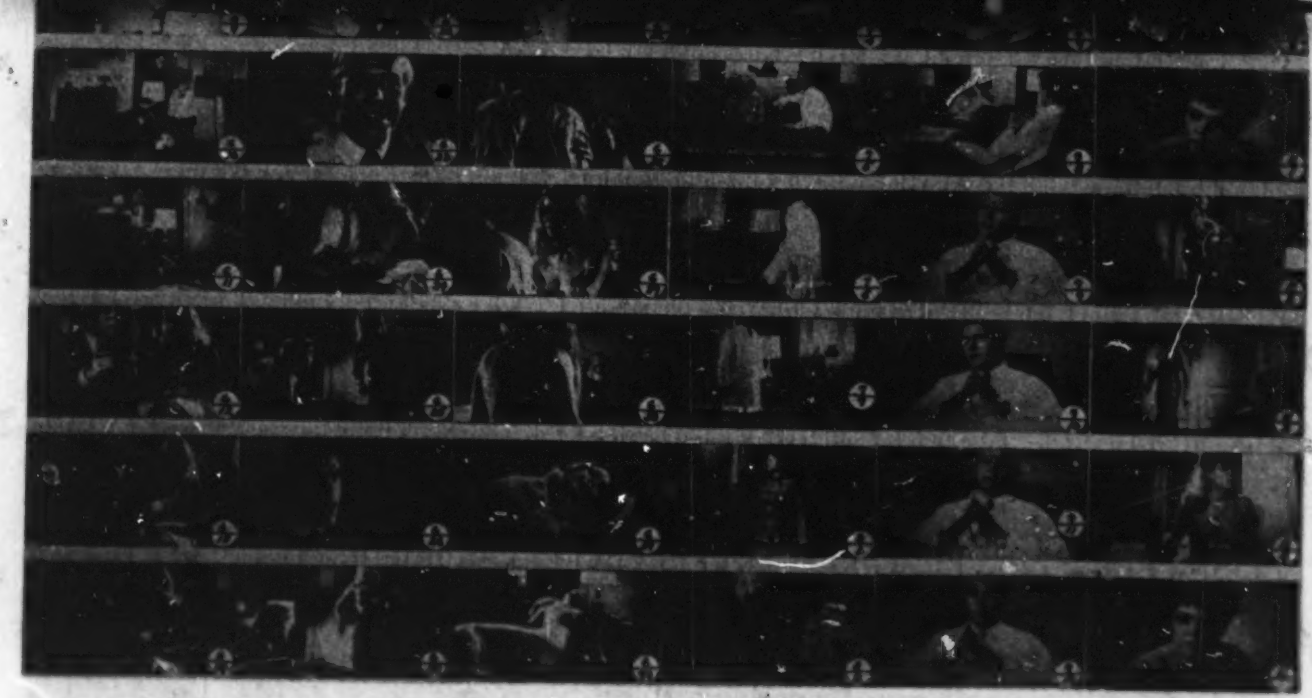
THE END

Appendix B

PICTORIAL CONTINUITY "WITHOUT A STITCH"
SCENES 1-52.

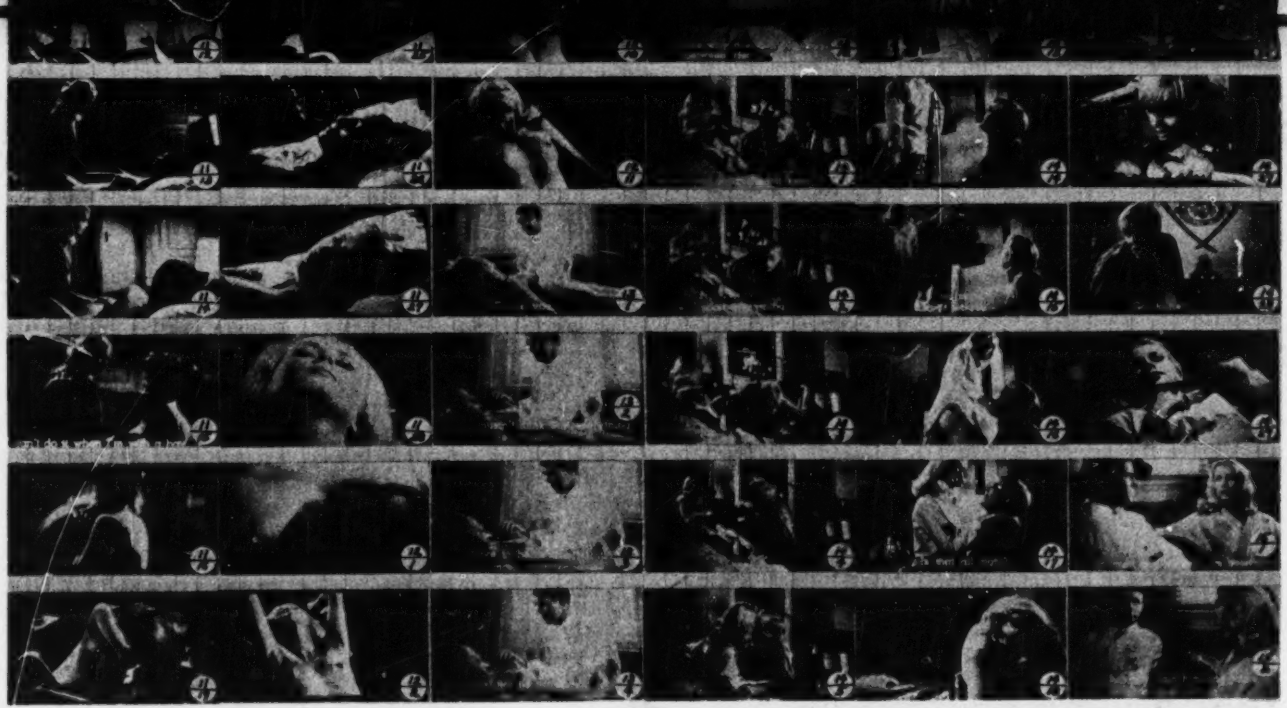
Hôtel
A Stil
HOTEL A STIL

Scene I - Introduction to Denmark 1-1 to 1-6. Scene II - Lillian returns to Dr. Petersen's office after European trip 2-1 to 2-10. Scene III credits 3-1 to 3-12. Scene IV - Flashback Lillian's first visit to doctor's office 4-1. Scene V - Lillian's first exam by Dr. Petersen 5-1 to 5-47. Scene VI - Lillian tells Henry her sexual experience 6-1 to 6-44.



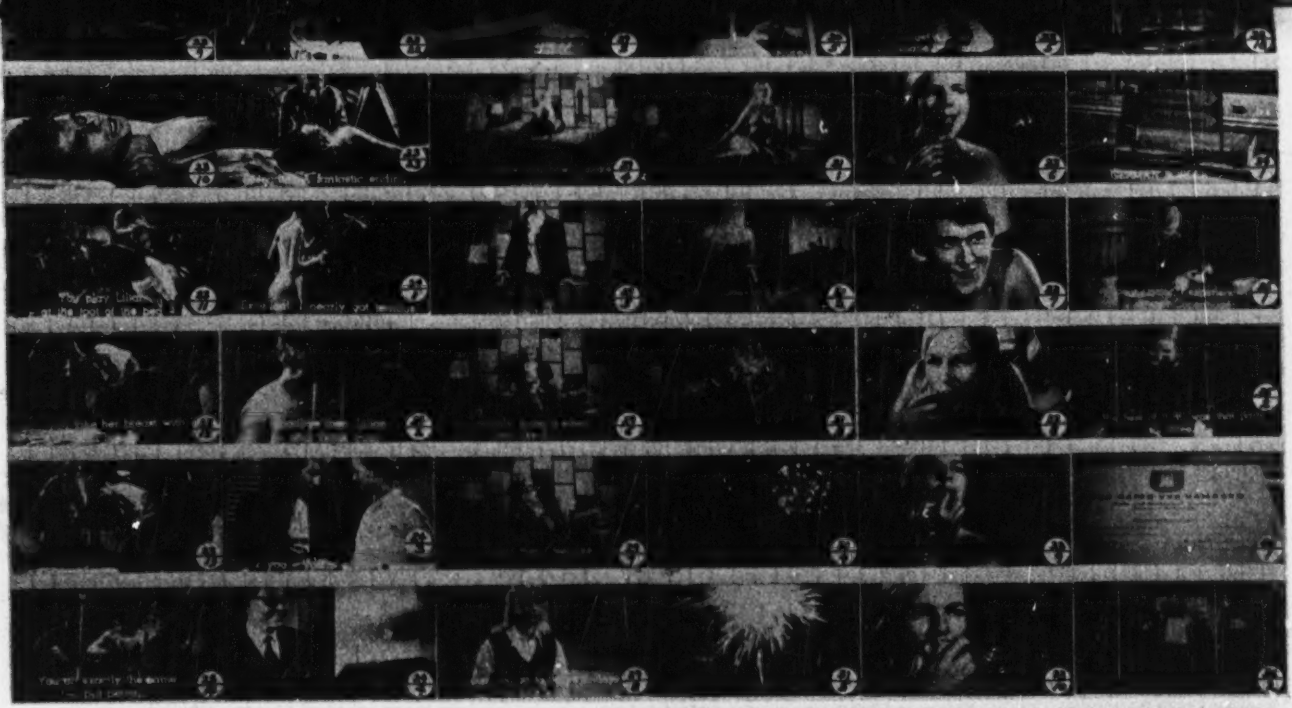
B-5

Scene VI cont. - Lillian and Henry attempt sexual contact 6-21 to 6-44. Scene VII - Dr. Petersen analyzes Lillian's sexual encounter with Henry 7-1 to 7-7. Scene VIII - Lillian and Britta leave doctor's office 8-1 to 8-3. Scene IX - Lillian revisits Dr. Petersen's office 9-1 to 9-17. Scene X - school playgrounds 10-1 to 10-3. Scene XI - Lillian and Brita have Lesbian encounter 11-1 to 11-28.

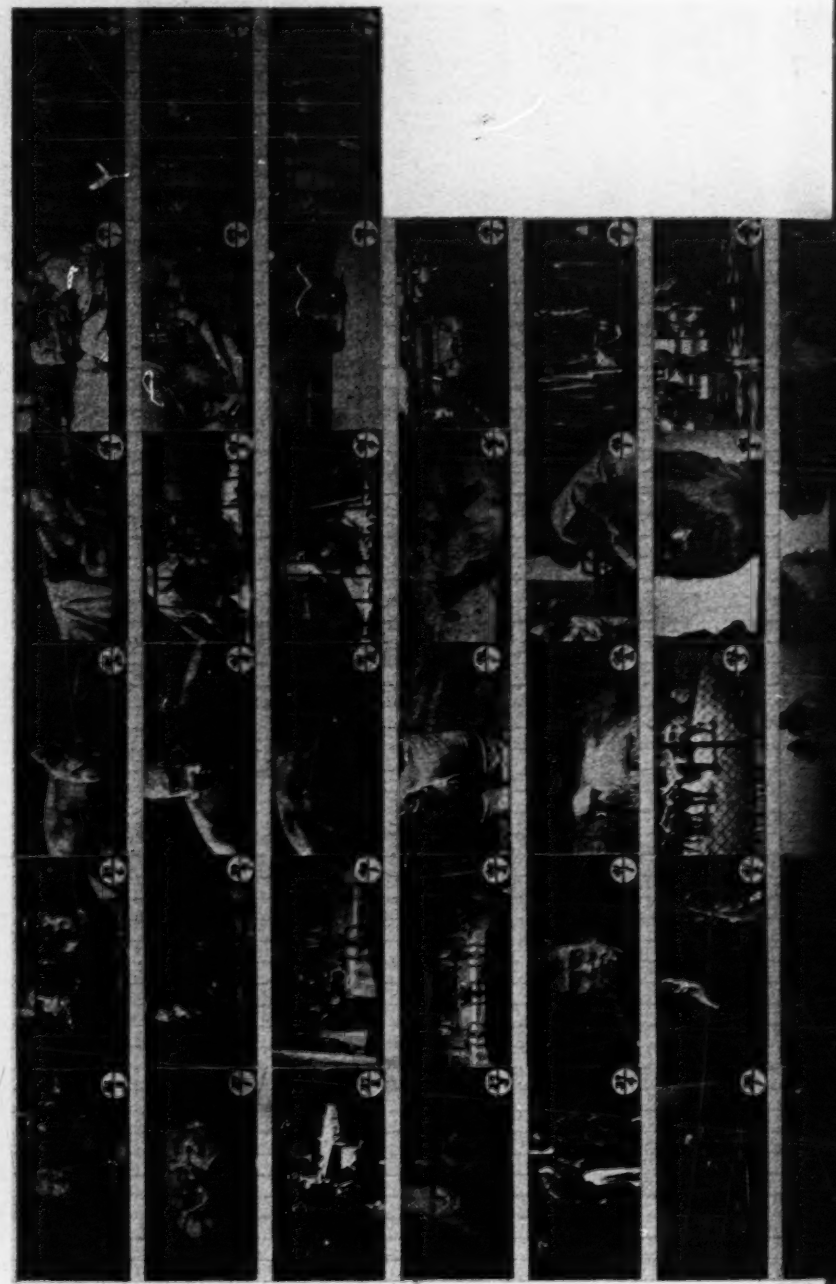


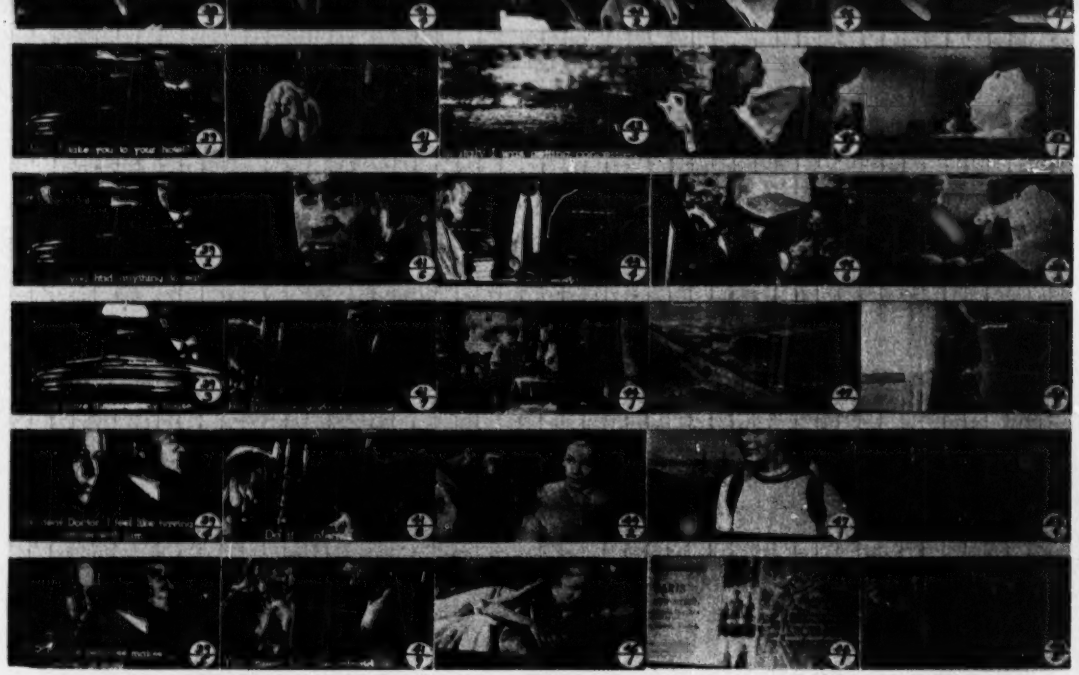
Scene XI cont. - 11-5 to 11-28. Scene XII - Dr. Petersen performs cunnilingus on Lillian in his office 12-1 to 12-11. Scene XIII - Dr. advises Lillian "I have to become a habit." 13-1 to 13-12. Scene XIV - continuation of sexual experience with Henry 14-1 to 14-29. Scene XV - Dr. Petersen advises Lillian " ...Learn how to be active." 15-1 to 15-6.

Scene XV cont. - 15-3 to 15-6. Scene XVI - Henry ignores Lillian 16-1 to 16-3. Scene XVII - Dr. Petersen tells Lillian "Your turn to be active". They have sexual intercourse 17-1 to 17-23. Scene XVIII - Lillian graduates - gets diary. 18-1 to 18-9. Scene XIX - Lillian thumbs a ride with Goran, a cameraman 19-1 to 19-14. Scene XX - Lillian and Goran have intercourse in truck. 20-1 to 20-15. Scene XXI - Lillian & Goran drive to Vitalia Films in Sweden 21-1 to 21-2. Scene XXII - Lillian is made up for Stag Film 22-1 to 22-5. Scene XXIII - Lillian performs in Stag Film 23-1 to 23-23.



Scene XXIII cont. - 23-2 to 23-23. Scene XXIV - Lillian is paid 24-1 to 24-4. Scene XXV - Lillian makes diary entry 25-1. Scene XXVI - Lillian leaves for Denmark 26-1. Scene XXVII - Lillian in Copenhagen 27-1. Scene XXVIII - Lillian meets Lisa 28-1 to 28-1. Scene XXIX - Lillian visits Lisa's apartment 29-1 to 29-11. Scene XXX - Lillian and Lisa shower together 30-1 to 30-5. Scene XXXI - Lillian and Lise use artificial penis in Lesbian activity 31-1 to 31-5. Scene XXXII - Lisa's kitchen 32-1 to 32-3. Scene XXXIII - Sex orgy, Lillian-Lisa-Male 33-1 to 33-18. Scene XXXIV - Lillian visits Hamburg 34-1. Scene XXXV - Lillian makes diary entry 35-1. Scene XXXVI - Lillian in German beer hall 36-1 to 36-3.





Scene XXXVI cont. -36-3. Scene XXXVII - Lillian sees female wrestling match 37-1 to 37-4. Scene XXXVIII - Lillian runs into Kurt near red light district 38-1 to 38-3. Scene XXXVIIII - Lillian accepts dinner at his home 39-1 to 39-7. Scene XXXX - Dining Kurt's home 40-1 to 40-2 Scene XXXXI - Kurt's bedroom - sadism masochism episode 41-1 to 41-12. Scene XXXXII - Lillian at Zoo 42--1 to 42-3. Scene XXXXIII - Lillian thumbs ride to Italy with Freddy 43-1 to 43-4. Scene XXXXIV - Rome cafe - Freddy and Lillian 44-1 to 44-2. Scene XXXXV - Freddy and Lillian - Sodomy in bedroom 45-1 to 45-5. Scene XXXXVI - Lillian performs simultaneous sodomy and sexual intercourse with Freddy and his friend 46-1 to 46-6. Scene XXXXVII - Lillian makes diary entry 47-0 to 47-1. Scene XXXXVIII - Lillian in Paris 48-1. Scene XXXXVIIII - Lillian meets goateed male in Paris 49-1 to 49-4. Scene L - Lillian buys clothes - leaves Paris 50-1 to 50-3. Scene LI - Lillian meets Henry on plane 51-1. Scene LII - Lillian revisits Dr. Petersen's – The Message 52-1 to 52-8. END.

Appendix C

Decision of Three Judge Court In the United States District Court For the Southern District of Ohio, Western Division in Cincinnati Properties, Inc. et al. v. Simon Leis et al., dated May 2, 1974, upholding the padlocking provisions of Ohio Revised Code sections 3767.01 et seq.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CINCINNATI PROPERTIES, INC. d/b/a/ Monte Vista Theater, Plaintiff, v. SIMON LEIS, et al., Defendants.	Civil Action No. 8471
STANLEY MARKS, Plaintiff, v. SIMON LEIS, et al., Defendants.	Civil Action No. 8714
TERRY L. BARNETT, et al., Plaintiffs, v. SIMON L. LEIS, JR., et al., Defendants.	C I 74-112
MONTY EMERY, Plaintiff, v. SIMON L. LEIS, JR., et al., Defendants.	C I 74-128

MEMO DECISION

Before Peck, Circuit Judge, and Porter and Hogan, District Judges.

Per Curiam

These cases, with the consent of all the parties, have been consolidated. In each of them the question of the

constitutionality (or the constitutionality as applied) of the Ohio "Nuisance" laws (O.R.C. 3767.01, et seq.) is involved, generally. Cross motions for summary judgment were filed in 8714 addressed to a common question (which motions have been briefed and argued and are herein considered).

In each of the cases this Court is asked to enjoin the abatement provisions of the Ohio statutes in the area of obscenity as violative of the First Amendment. Three of the consolidated cases involve Adult Bookstores (offering books, pamphlets and, in addition, so-called Peep Movies). One (8471) involves a movie house.

Civil Action 8714 was preceded by an action instituted under the Ohio statutes in the Hamilton County Common Pleas Court against the operator of three book stores and the owners of the real estate involved. A restraining order issued in the State Court action against the removal of any property from the locations pending the taking of an inventory. The inventory was promptly taken. Thereafter the restraining order was dissolved and operations were renewed. Civil No. 8714 was filed in this Court at that stage (to enjoin further proceedings in the state case) and the state case is in status quo by agreement of the parties pending decision by this Court on the pending motions. Prior to the filing of the action in the Common Pleas Court, the plaintiff had "sampled" the offerings of the stores and evidence of some 51 samplings (books, magazines, pictures (stationary and movie)) were filed with the state complaint. By stipulation of the parties to 8714, it is agreed that the samplings are each de facto and de jure obscene, under any test - whether Miller (Miller v. California, 413 U.S. 15 (1973)) or pre-Miller.

In 74-128 (Emery) the proceedings have progressed further. One Adult Bookstore is involved, called "Sin City." It has been in operation for several months during which time various law enforcement officers have entered and sampled the offerings (magazines and films). These films and magazines (11 in number) are specifically named in the complaint filed in the Common Pleas Court and the same stipulation as to obscenity applies to that case. An inventory was taken and the case was tried on the merits in the Common Pleas Court. It is important to note that prior to the merit hearing in that court there was no significant interference with the Bookstore's business, i.e., there was no significant restraint prior to a fully noticed and adversary judicial hearing. There is no doubt that the "samples" were representative - at least the parties are in agreement that hundreds of other books and pamphlets and significantly additional movies (in addition to the 11 specific) were in the inventory of the operator. The State Court, as a result of that hearing, concluded that a "nuisance" existed at the location, ordered its "abatement," ordered the place involved "padlocked" for a year, but extended to the owner the statutory opportunity of retaking possession upon giving bond.

In 8471 a movie house is involved. The two movies exhibited at one performance furnished the basis for the abatement action in the State Court. On a finding of obscenity with respect to these movies, a nuisance judgment issued including an abatement and one year "padlock" order. This Court temporarily enjoined the closing. Temporary injunctions have been denied in the bookstore cases.

A brief description of the Ohio Nuisance statutes (O.R.C. 3761.1, et seq.) is appropriate. A "nuisance" includes "any place....in which or upon which lewdness.... is conducted....or upon which lewd or obscene films....are shown" and includes the personal property used in connection with conducting the nuisance. Either a private person or the prosecuting attorney may bring an action to abate the nuisance and enjoin its maintenance. Upon the filing of a complaint the State Court may issue a restraining order preventing removal of any property from the place and the Sheriff is required, if such order issues, to forthwith inventory the personal property in the location. A hearing for temporary injunction purposes is provided for, which may be combined with a merit hearing. This much appears clear - except for the restraint for inventory purposes, there is no seizure nor any interference, nor any suppression of any speech or ideas until a judicial hearing. The hearing provided for is a prompt one (within 10 days and on 5 days' notice).

The section of the Ohio law which is most directly involved in these cross motions is that dealing with the decree upon a merit hearing by the State Court. The statute provides that if the existence of the nuisance be established the final decree "shall include an order directing the effective closing of the place against its use for any purpose [1] and keeping it closed for a period of one year unless sooner released....the owner may then appear and

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[1] As applied to a book store - since such an order prevents the sale of books, for instance, in addition to those sampled and the subject of specific obscenity findings by the State Court, this provision is claimed to be an illegal "prior restraint."

obtain" a release under a bond "conditioned upon the abatement of the nuisance and preventing the same from being established." As recently construed by the Ohio Supreme Court, as applied to movies, these conditions do not "require the owner to show that no film to be exhibited during the one-year period will be obscene....such a requirement would be an unconstitutional prior restraint." State, ex rel v. Film, 37 Ohio St.2d, at 105 (1974).

The parties are all in agreement that the narrow question before us is whether or not the abatement and closing (for a year) provisions of the Ohio statute are constitutional.

The plaintiffs' claim for relief is based on four grounds. The first is that the Ohio courts are applying or will "over-broadly" apply the nuisance section in that the Chapter, as such, applies only to motion picture films. However (a) the operator is, in each instance, or was, at the time pertinent, exhibiting a film, and (b) at least where the construction is arguable, it is one for the Ohio Courts and the Ohio Courts have construed the section as applicable to books and pamphlets, as well as to films.

The second ground is stated in terms of retroactivity and in short is this: That the decision in Miller, 413 U.S. 15 (1973), changing the standard set forth in Memoirs, 383 U.S. 413 (1966), effectively "scrapped" all previously passed state obscenity statutes (and with them nuisance statutes based thereon). Or, to put it another way, the plaintiffs claim (a) that the Ohio statutes in question, by judicial interpretation, incorporated the definitions set forth in Memoirs (and see State v. Mazes, 7 Ohio St.2d 136 (1966)); (b) since Miller changed the constitutional test,

the Ohio statutes are necessarily vague and overbroad (at least until redefined by the courts or the legislature). The answer to that is that the Supreme Court indicated to the contrary when, in 1973 and after Miller, THE COURT remanded a number of cases then pending before it to trial courts to give those courts the opportunity to determine the obscenity questions involved consistent with the opinion in Miller. (Cf. State, ex rel v. Vixen, 35 Ohio St.2d 215 (1973)

The third ground is that the statutes, as written, necessarily are unconstitutional as a prior restraint on presumptively protected First Amendment material and the fourth is that if there be any doubt of that, the doubt is removed by the application of the statutes by the Ohio courts. In that connection this consolidated proceeding does indicate on its face that there have been at least two applications of the statutes by the local state courts. In the one (8471 - Monte Vista) a movie house was closed or padlocked for a year and the owner refused access to the premises for any purpose and under any conditions. This Court enjoined the enforcement of that order. In the other (C 1 74-128 - Emery) a book store has been ordered padlocked (closed) for a period of one year. The order afforded to the owner the bond opportunity. The conditions of the bond, as stated in the order, complied with the statutory construction adopted by the Ohio Supreme Court in State, ex rel v. A Film, 37 Ohio St.2d, at 105. Specifically, the conditions would be broken only by the commission of a future nuisance consisting of the sale or exhibition of some or all of the materials as had theretofore and in the abatement proceeding been judicially determined by the State Court to be obscene. The facts in

74-128 furnish a fair foundation for the plaintiffs' applied argument. (The State Order involved in 8471 does not - it went contra to the statute and contra to the construction subsequently placed upon the statute by the Ohio Supreme Court.)

The plaintiffs' constitutional argument is this: A person is operating a book store containing a thousand different items each concededly presumptively protected by the First Amendment - a fair sampling of the 1,000 produces 50 which are subsequently the subject of an adversary judicial proceeding and found to be obscene. Any state remedy applied to the facts which prevents the operator from staying in business at that location and selling the other non-judicially examined materials is a prior restraint on the sale of those materials and therefore violates the First Amendment. We do not agree. The argument overlooks the right of the State, within constitutional bounds, to declare or define public nuisances and abate them. A state may, of course, in the exercise of its police powers, prohibit certain conduct. It is not questioned - whatever the difficulties of ascertainment - that the states have power to prohibit obscenity and, within the Miller limits, to determine what is and is not. Kingsley v. Brown, 354 U.S. 436 (1967); United States v. Reidel, 402 U.S. 351 (1971); Miller v. California, 413 U.S. 15 (1973); Paris v. Slaton, 413 U.S. 49 (1973). Nor is it questioned that a state, having judicially determined that a given product is obscene, may validly enjoin the sale of that product by an individual, provide for its destruction and/or provide a criminal sanction. The falacy of the plaintiffs' position is somewhat indicated

by this simple example: A person possessing for sale one copy of one book concededly obscene and ten copies of a concededly non-obscene book is imprisoned for the former - during the term of imprisonment he is effectively stopped from dealing in non-obscene materials. Surely it would not follow that the imprisonment was unconstitutional because it was a prior restraint respecting the innocent materials.

From time immemorial states have chosen, in the exercise of their police power, to define certain action as illegal and, in addition, to define the place where certain prohibited activity is carried on as a "nuisance." The attendant remedy provided in such nuisance cases has been one against the place in which the activity has been carried on. This record is clear that the business of selling books and materials and offering shows was being carried on in the involved locations (see, for instance, the hundreds of publications contained in the "Inventory" involved in No. 8714 (copy of the state court record attached to defendant Conroy's motion for summary judgment). No one questions that the sampling was a fair one and that sampling produced what is 100%, on this record, illegal and unprotected obscenity.

The State of Ohio has seen fit to define as a nuisance, subject to abatement, a place in which obscenity is conducted. There being no question of fact that a business of obscenity was carried on, the question in this case is, therefore, really whether the State may validly define the operation in the place as a nuisance and close it for a year - padlock it - on that basis. If it can, there is no prior restraint of the non-judicially-viewed material, except purely incidental. As Mr. Justice Frankfurter said in

Kingsley, at p. 441, "the phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test. The duty of closer analysis and critical judgment in applying the thought behind the phrase has thus been authoritatively put by one who brings weighty learning to his support of constitutionally protected liberties: 'What is needed,' writes Professor Paul A. Freund, 'is a pragmatic assessment of its operation in the particular circumstances. The generalization that prior restraint is particularly obnoxious in civil liberties cases must yield to more particularistic analysis.'"

The constitutional power of the State to abate what has been appropriately defined as a public "nuisance" has never been seriously questioned. "Padlock" remedies have been consistently provided for by most states in the areas of prostitution, gambling, and liquor violations. It is not for us to conclude that one or the other of these subjects vis-a-vis the State's padlock power should be classed differently than obscenity. Each is a proper object of the police power and not unrelated. To quote again from Kingsley, at page 441, the Supreme Court, speaking in the area of dissemination of pornography, said:

> "It is not for this Court thus to limit the State in resorting to various weapons in the armory of the law. (Underscoring ours.) Whether proscribed conduct is to be visited by a criminal prosecution or by a qui tam action or by an injunction or by some or all of these remedies in combination, is a matter within the legislature's range of choice."

Mugler v. Kansas, 123 U.S. 623 (1887) involved Kansas' first prohibition laws and, among others, a section providing, "All places where intoxicating liquors are....

sold....are declared to be common nuisances and upon the judgment of any court....finding such place to be a nuisance under this section, the sheriff....shall be directed to shut up and abate such place...." The place involved had been the subject of liquor sales. The Court, in upholding the constitutionality, said:

> "The State, having authority to prohibit the.... sale of intoxicating liquors....we do not doubt her power to declare any place kept and maintained for the illegal manufacture and sale of such, shall be deemed a common nuisance and to be abated, and, at the same time, to provide for the indictment and trial of the offender. One is a proceeding against the property used for forbidden purposes....The statute does not put the brand of a common nuisance upon any place, unless....that place is kept and maintained for purposes declared by the legislature to be injurious to the community." (Underscoring ours.)

The padlocking provision of the Ohio statute is a time honored remedy involving the place - it is not censorship or prior restraint.

A proposed order, consistent herewith, may be presented, dismissing the complaints, except for the Monte Vista case - 8471. (A case similar in every respect to Monte Vista is pending in the Supreme Court on appeal from the Northern District of Ohio, and the Monte Vista case will remain in status quo pending the determination of that appeal.)

John W. Peck, Circuit Judge

David S. Porter, District Judge

Timothy S. Hogan, District Judge

Appendix D

Variety Weekly Magazine news article of Jan. 28, 1970 reporting M. P. A. A. President Jack Valenti's reaction to the introduction of the film "Without A Stitch" to first-class movie houses.

VALENTI LASHES OUT AT LOEW'S

Variety Weekly Magazine, Wednesday, Jan 28, 1970.

Deplores Circuit Playing 'Without A Stitch', Which He Declares Is Porno 'Trash'

By Gene Arneel

New York, Jan. 27—Prexy Jack Valenti of Motion Picture Assn. of America has delivered an unprecedented blast at a major theatre company—Loew's—because that Tisch-operated circuit saw fit to book and play "Without a Stitch" at its State I and Cine first-runs in Manhattan. (Film also opens tomorrow at Loew's Century and Picfair in L.A.)

Valenti said that for first time he's sounding the theme that "exhibitors in order to protect their future" cannot be both voyeur and a community enterprise.

"If there is a proliferation of the quasi-porno film playing in first-class houses to the exclusion of product of a wider appeal, we are in deep trouble."

In a phone conversation with a reporter, Valenti in Washington said he regards Loew's Cine as a test spot for major showcase exposure.

Actually, Valenti launched his attack Jan. 14 in a speech before Cleveland Graphic Arts Council and the Printing Industries Assn. of Northern Ohio in Cleveland. He told audience he was "unhappy" because "one of the nation's leading film chains recently booked and played a film that is a vicious, crass, [illegible] pornographic to the place of option."

In his Cleveland address, Valenti did not identify "Stitch" nor mention Loew's. But in talking to DAILY VARIETY he was not so reticent, specifying both "Stitch" and Loew's.

"Stitch" is a Danish import released by Sherpix. Its unnumes are talented performers, naked, with uninhibited sexual drive. A newsman found it a more professional job than "I Am Curious (Yellow)" in the cinematic sense.

Although doing strong business at both theatres, "Stitch" shortly is to be yanked from Cine due to, according to Loew's spokesman, a locked booking.

A Sherpix rep was heard to murmur sotto voce that, in effect, something's rotten in Denmark.

Valenti's talk in Cleveland curiously got but a meager play in the general press.

He related he "told the chief executive of this chain that if other large, responsible theatre operators decide to play this kind of film, then we are going to be witness to the death of quality exhibition in this country. The theatre cannot have it both ways. The theatre cannot be half quality and half smut."

Valenti is angry, he said, because "too many theatre playdates are going to the frankly salacious film" and he opines that "the bad will drive out the good."

MPAA's head man stated he knows of "many responsible producers and distributors who cannot get theatre playing time for many of their pictures which can be viewed by all ages, as well as by those youngsters whose parents accompany them to the theatre. This is an unhappy augury for the future of responsible, serious movie-makers who are willing to invest large sums of money in craftsmanship and skill."

Valenti said there'll always be an audience for "this kind of picture" but he wants such product as "Stitch" to play only in theatres that specialize in sex pix.

"The responsible producers, distributors and exhibitors have created a movie rating system which, after a year's operation, has proven a success. Its sole objective is to inform parents and young people about the suitability of movie content for viewing by youngsters. We do not ban movies or censor them. But we do perform an essential service."

Valenti Wants Minors Protected From Porno

Washington, Jan. 27—House Judiciary Subcommittee holding hearings on measures to control obscenity today heard Jack Valenti urge federal legislation banning mailing of unsolicited pornography to minors.

Valenti said he lauds any governmental means of protecting youngsters from pornography, that organized film industry goes hand in hand with this objective via its rating system.

Industrywide Ramification

New York, Jan. 27—MPAA prez Jack Valenti's declared war with Loew's has industrywide ramifications. This major circuit is an important member of National Assn. of Theatre Owners, which is on record with a pledge of cooperation with Valenti and the rating system.

The spirit of such cooperation seems lacking on Loew's part via the firstrun booking of "Without a Stitch," which was not submitted for code classification, but distributor Sherpix gave the film an X. One theatre poster billed it XX, but this subsequently was removed.

NATO prexy Eugene Picker and Intl. Film Importers & Distributors of America have been working in harmony with Valenti on vocabulary changes in the ratings. There's nothing binding about the code, but Loew's playing of "Stitch" is regarded as a departure from the harmony.